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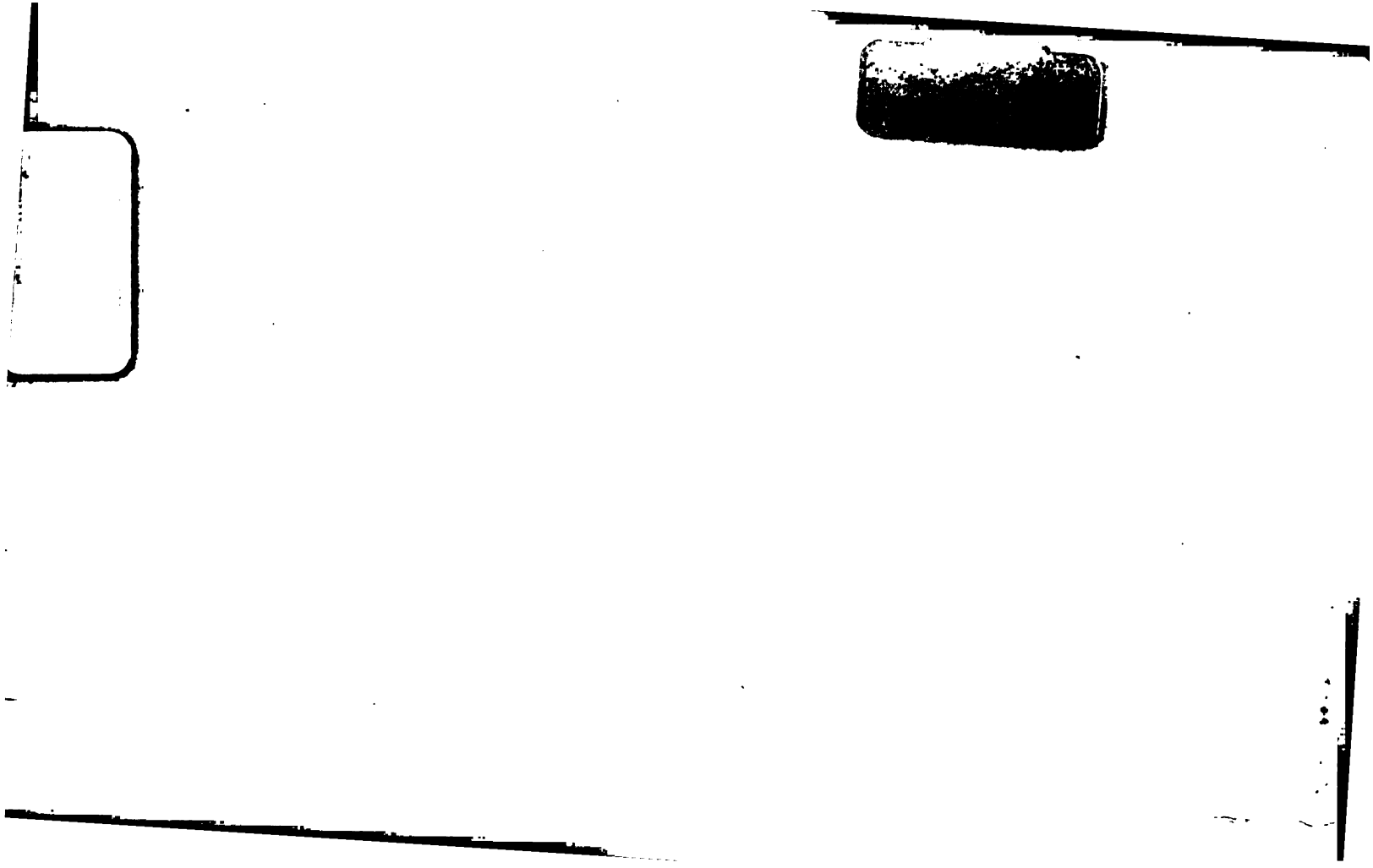

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Modern American Law

A Systematic and Comprehensive Commentary on the Fundamental Principles of American Law and Procedure, Accompanied by Leading Illustrative Cases and Legal Forms, with a Revised Edition of Blackstone's Commentaries

PREPARED BY

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FIFTEEN VOLUMES

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Modern American Law

LAW OF
REAL PROPERTY

BY
ARTHUR W. BLAKEMORE, A.B., LL.B.,
OF THE BOSTON BAR

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PREFACE.

The law of real property embraces such a broad field that this entire volume is devoted exclusively to a discussion of its governing principles and its leading cases.

Arthur W. Blakemore, A.B., LL.B., of the Boston Bar, the author of "Law of Real Property" herein, has divided his treatment of the subject into four general parts: I. Nature of Ownership in Land; II. Use and Enjoyment Incident to Ownership of Land; III. Use and Enjoyment of Land of Another; IV. Acquisition or Transfer of Title.

In the succeeding volume are logically included the allied branches of the law of real property: "Wills and Administration," "Descent and Distribution," "Water Rights and Irrigation," "Mines and Mining," thus rounding out in Modern American Law a full and adequate treatment of this all-important branch of the law.

In his discussion of real property law, Mr. Blakemore has carefully traced its history and development from early feudal times. Needless to say, a knowledge of this history is quite essential to a clear understanding of the various rules which govern the practice of the law of real property by the modern

conveyancer and its administration in the courts of the present day.

Herein, then, the practicing lawyer may find ready to his hand a succinct and comprehensive statement of the general law which will aid him in ascertaining and formulating the specific rules concerning real property in his own particular state. The student of the law also will find here a clear outline of governing principles, which will materially assist him in mastering this subject. For, so far as possible, this most technical and complex branch of the law is presented by Mr. Blakemore in language which is comprehensible alike to attorney, student and lay reader.

TABLE OF CONTENTS

LAW OF REAL PROPERTY

(The figures refer to those at the foot of the pages.)

PART I.

NATURE OF OWNERSHIP IN LAND.

CHAPTER I.

ORIGIN AND TERMINOLOGY OF RIGHTS IN LAND.

SECTION		PAGE
1.	Classes of property—Movable and immovable—Tenements and hereditaments	1
2.	Origin of the terms real property and personal property	2
3.	Corporeal and incorporeal property	3
4.	Other terms used to designate corporeal hereditaments, or land	4
5.	Property and title distinguished	6

CHAPTER II.

REAL AND PERSONAL PROPERTY DISTINGUISHED.

6.	In general	7
7.	Crops	7
8.	Fixtures	8
9.	Heirlooms	8
10.	Manure	9
11.	Mines	10
12.	A room in a building	10

SECTION PAGE
13. Stock in corporations 10
14. The same property may be either real or personal... 11
15. Who are interested in distinguishing between real and personal property 11

CHAPTER III.

THE FEUDAL SYSTEM.

16. The feudal system in Europe 13
17. Introduction of the feudal system into England 14
18. Feudal fruits and privileges 15
19. Influence of the feudal system on individual rights.. 16
20. Decline of the feudal system 17

CHAPTER IV.

MANORS.

21. Nature and origin 18
22. History 18
23. Tenure 20

CHAPTER V.

SOURCES OF TITLE IN THIS COUNTRY.

24. American titles based on right of discovery and possession 21
25. Effect of colonial charters 22
26. Title to land under colonial charters 22
27. American law evolved from the English law 23
28. Acquisition by the United States of English titles... 23
29. Cession of lands by the colonies to the general government 24
30. Subsequent purchases and acquisitions by the United States 25
31. Rights of the Indians to the land 25
32. Indian titles 27
33. Relations of the United States government with the Indian tribes 29

SECTION PAGE
34. How far Indian titles are sustained..... 30
35. Pre-emption under federal statutes..... 31

CHAPTER VI.

TENURES.

36. Tenures defined..... 32
37. The Saxon system of tenures..... 32
38. The Domesday Book..... 32
39. All lands held of king..... 33
40. Four principal tenures..... 33
41. Tenure in chivalry..... 34
42. Grand sergeanty..... 34
43. Villeinage and copyhold tenures..... 35
44. Frankalmoign 35
45. Tenure in England today..... 36
46. Tenure in this country..... 36

CHAPTER VII.

SEISIN AND LIVERY OF SEISIN.

47. Seisin defined..... 38
48. Attributes of seisin..... 38
49. The effect of seisin on devise of land..... 39
50. Seisin in case of remainders..... 39
51. Disseisin..... 40
52. Seisin a fundamental idea of our land law..... 40
53. Seisin vital today..... 41
54. The ceremony of livery of seisin..... 41
55. Livery of seisin and feoffment..... 43
56. Kinds of livery of seisin..... 43
57. Livery of seisin in the United States..... 44

CHAPTER VIII.

THE GROWTH OF INDIVIDUAL RIGHTS IN PROPERTY AND OF ALIENATION.

58. The growth of individual rights in land..... 45
59. Who may be freeholders—Persons—Aliens..... 46

SECTION PAGE

60. Who may be freeholders—Corporations—Mortmain Acts 46
61. Subinfeudation 47
62. Statute of Quia Emptores..... 47
63. Right to devise land by will..... 48

CHAPTER IX.

ESTATES.

64. Estates defined..... 49
65. Distinction between freehold estates and others..... 49
66. Estates less than freehold..... 50
67. A tenant to the praecipe..... 50
68. Freehold cannot be in abeyance..... 51
69. Freehold must be continuous..... 52
70. Frankmarriage 52
71. Equitable estates have same incidents as legal estates 52
72. Reservations 54

CHAPTER X.

FEE SIMPLE.

73. Meaning of an estate in fee simple..... 55
74. Necessity of word "heirs" to pass a fee..... 55
75. Same subject—Modern rule..... 56
76. Unlimited right of alienation..... 58
77. Incidents of fee—Restrictions on alienation..... 58
78. Liability to debts of deceased owner..... 59
79. Fee in incorporeal hereditaments..... 61

CHAPTER XI.

DETERMINABLE OR BASE FEE.

80. Definition 62
81. Incidents of base fee..... 63
82. When base fee or reversion becomes a fee simple... 63

SECTION PAGE

83. Conditional fee distinguished from estate upon condition 64
84. Conditional limitation distinguished from condition. 64
85. Reversion and possibility distinguished..... 65

CHAPTER XII.

ESTATES TAIL.

86. Nature—Terminology 66
87. Early history and construction..... 67
88. Estates tail a form of conditional fee..... 67
89. Words necessary in a deed and in a will..... 68
90. Gift over on failure of issue..... 69
91. Same subject..... 69
92. The rule in Wild's Case..... 71
93. Growth of the right of alienation..... 72
94. The Statute De Donis Conditionalibus..... 73
95. Statute De Donis not applicable to personalty..... 75
96. Common recoveries..... 75
97. Other methods of docking entail..... 78
98. Exceptions to the right of tenant in tail to bar the entail 78
99. Effect of conveyance by tenant today..... 79
100. Rights and liabilities of tenant..... 79
101. Estates tail in the United States..... 80
102. Statutes abolishing estates tail—Constitutionality.. 80

CHAPTER XIII.

RULE IN SHELLEY'S CASE.

103. Statement of rule..... 83
104. Origin and reason for rule..... 85
105. Effect of rule..... 87
106. Same Subject..... 88
107. A rule of property and not of construction..... 88
108. Cases where the rule in Shelley's Case does not apply 88
109. Cases where no freehold is given the ancestor or estate of inheritance to the heirs..... 89

SECTION PAGE
110. When the effect of the word "heirs" is changed by explanatory words..... 90
111. Where the new estate of inheritance is grafted on the heirs, the rule does not apply..... 91
112. Remainder to heirs of two persons who may have common heir..... 92
113. Other examples where the rule does not apply.... 93
114. Executory trusts—Marriage settlements..... 94
115. Joint estates..... 94
116. Rule inapplicable to gift of income..... 94
117. Equitable interests..... 95
118. Contingencies 95
119. Personal property..... 95
120. The rule in Shelley's Case in the United States..... 96

CHAPTER XIV.

LIFE ESTATES.

121. Origin 97
122. Nature—Creation 97
123. Right to assign or create sub-tenancies..... 98
124. Estate pur autre vie..... 99
125. Statutes affecting estates pur autre vie..... 99
126. Fraud in case of estates pur autre vie..... 100
127. Termination by civil death..... 100
128. Merger 101
129. Apportionment of rent..... 102
130. Rights of life tenant—Waste..... 102
131. Improvements 103
132. Duty to pay taxes and interest on incumbrances... 103
133. Duty of tenant to defend title..... 104

CHAPTER XV.

RESTRAINTS ON ALIENATION.

134. Legal and equitable estates..... 105
135. Restraint either direct or indirect..... 105
136. Restriction on the power to lease..... 106

SECTION PAGE
137. Fees 106
138. Conditional restraint on fee in general..... 107
139. Limitations to particular persons..... 107
140. Restriction for certain time..... 107
141. Perpetuities 108
142. Gifts to charities or legislative grants..... 108
143. Grants to corporations..... 109
144. Estates tail..... 109
145. Life estates..... 109
146. Estates of married women..... 110
147. Other estates..... 110
148. The English rule as to spendthrift trusts..... 110
149. The American rule as to spendthrift trusts..... 111
150. Jurisdictions opposed to the American rule..... 112
151. Trusts for grantor..... 113

CHAPTER XVI.

ESTATES UPON CONDITION.

152. In general..... 114
153. Nature of an estate granted upon condition..... 114
154. Validity 115
155. Conditions precedent and subsequent defined..... 115
156. Conditions subsequent..... 116
157. Time of performing conditions..... 117
158. Illegal or impossible conditions..... 117
159. Same subject..... 118
160. Conditions in restraint of marriage..... 119
161. A condition subsequent must not violate any rule of property 119
162. The use of land may be restricted in the grant..... 120
163. Same subject—Where condition is of no value to grantor 121
164. Assignment of possibility of entry..... 122
165. Effect of assignment..... 122
166. Conveyance of right of entry after condition broken 123
167. License to break a condition—The rule in Dumpor's Case 123

SECTION PAGE
168. Effect of a breach of the condition..... 124
169. Enforcing breach of condition..... 124
170. Equitable relief against breach..... 125

CHAPTER XVII.

USES.

171. Origin of uses..... 126
172. Same subject—Consideration for grant..... 127
173. Uses as an attack on the feudal system..... 130
174. The operation of the Statute of Uses..... 130
175. Lease and release—Bargain and sale..... 132
176. Application of statute to a use on a use..... 134
177. When trusts survive the statute..... 134
178. Effect of the statute on devises..... 135
179. Statute of Uses in the United States..... 135

CHAPTER XVIII.

EQUITABLE CONVERSION.

180. Nature and origin of doctrine..... 136
181. When conversion takes place..... 137
182. At what instant conversion takes place..... 138
183. Conversion of partnership property..... 138
184. Effect of option..... 139
185. Reconversion 139

CHAPTER XIX.

REMAINDERS AND REVERSIONS.

186. Meaning of a reversion 141
187. Meaning of a remainder 142
188. Remainders and reversions distinguished..... 143
189. Future estates at common law..... 144
190. Estates at common law could not begin at a future time 145
191. How a reversion or a remainder might be conveyed at common law..... 146

SECTION PAGE
192. When the seisin of any subsequent estate must take effect 147
193. Fee simple divided into successive estates..... 148
194. Necessity of a particular estate of freehold..... 149
195. Vested and contingent remainders..... 149
196. Construction as to vested or contingent remainder.. 151
197. Remainder to right heirs..... 152
198. Contingent remainder becoming vested..... 152
199. Alteration of interests before testator's death..... 153
200. Alteration of interests after testator's death 153
201. Remainderman may be uncertain during particular estate 154
202. Classes 154
203. Remainders after estates tail..... 155
204. Remainder vesting on determination of the particular estate..... 155
205. Heirs construed heirs of the body..... 156
206. Uncertainty whether remainderman will ever enjoy estate 156
207. Rule of vesting..... 157

CHAPTER XX.

CONTINGENT REMAINDERS.

208. Origin and classification..... 158
209. Possibility on a possibility..... 159
210. Cross remainders..... 159
211. Presumptions of construction..... 160
212. Contingent remainders preferred to executory devises—Origin of the latter..... 160
213. Contingent remainder distinguished from conditional limitation 161
214. Contingent remainder must not lap over preceding estate 162
215. Preservation of contingent remainders..... 162
216. Trusts to preserve contingent remainders..... 163
217. What will support a contingent remainder..... 163
218. Merger of contingent remainders..... 164

SECTION PAGE
219. Merger to squeeze out contingent remainder..... 165
220. Alienation of contingent remainders..... 165
221. Same subject 166
222. Statutes affecting contingent remainders..... 167
223. How a will may be drawn so as to give the devisee the right to sell and yet have the remainder go to a third person..... 167

CHAPTER XXI.

CONDITIONAL LIMITATIONS—EXECUTORY DEVISES—SHIFTING AND SPRINGING USES.

224. An estate upon condition distinguished from an estate upon conditional limitation..... 169
225. Same subject..... 170
226. Same subject..... 172
227. Words of condition or of limitation..... 173
228. Rule against perpetuities applying to conditional limitation and not to condition..... 174
229. A condition is to be distinguished from a trust..... 175
230. The estate over in a conditional limitation is to be distinguished from a remainder..... 175
231. An estate upon conditional limitation distinguished from an estate tail..... 177
232. Limitation over of estate undisposed of..... 177
233. Meaning of an executory devise..... 180
234. Origin of executory devise..... 180
235. Shifting or springing use..... 182

CHAPTER XXII.

THE RULE AGAINST PERPETUITIES.

236. Definition 183
237. Origin 184
238. Effect of the creation of executory devises..... 185
239. Growth of rule—Limitation within life in being.... 186
240. Number of lives in being..... 186
241. Number of lives used as test..... 187
242. Period in gross added to rule..... 188

SECTION PAGE
243. Period of minority added to rule..... 189
244. Period of gestation added to rule..... 189
245. Several periods of gestation..... 190
246. Posthumous children..... 191
247. Effect of possibility of issue extinct..... 192
248. Reason for rule..... 193
249. The New York rule..... 193
250. Alienability not the test..... 194
251. Mere possibility that limitation may be remote invalidates it..... 195
252. Where subject of gift must fail within the period... 195
253. Description of beneficiary..... 196
254. Gift construed as valid if possible..... 196
255. Effect of remoteness..... 197
256. Possibility on a possibility..... 198
257. Accumulations 198
258. Same subject..... 199

CHAPTER XXIII.

APPLICATION OF THE RULE AGAINST PERPETUITIES.

259. In general..... 201
260. The rule does not apply to vested interests..... 201
261. Estate tail..... 202
262. Limitations before and after an estate tail..... 202
263. Limitations after equitable estate tail..... 203
264. Limitations over upon failure of issue..... 204
265. Same subject..... 205
266. Conditions 206

CHAPTER XXIV.

THE RULE AGAINST PERPETUITIES APPLIED TO CHARITIES.

267. What charitable gifts subject to rule..... 208
268. Limitation to charities..... 209
269. Limitation after charitable gift..... 209
270. Limitation from one charity to another..... 210

SECTION PAGE
271. Gift to corporation to be formed—Cy pres..... 211
272. Trust for indefinite period..... 211

CHAPTER XXV.

THE RULE AGAINST PERPETUITIES APPLIED TO CLASSES.

273. Definition of class..... 213
274. Class treated as a whole..... 213
275. The situation at the death of the testator will govern 214
276. Same subject..... 216
277. Rules for determining whether a devise to a class is invalid 217
278. Rules for determining whether or not the class is closed 219
279. Where members of class must necessarily be within the rule..... 222

CHAPTER XXVI.

THE RULE AGAINST PERPETUITIES APPLIED TO POWERS.

280. In general..... 223
281. Donee of general power treated as owner..... 224
282. Whether donee of power to leave by will is treated as owner..... 225
283. Date for reckoning validity of appointment under special power..... 226
284. Power of sale..... 226
285. Where description might be remote but actual facts show the contrary..... 227
286. Same subject..... 228

CHAPTER XXVII.

THE RULE AGAINST PERPETUITIES APPLIED TO MODIFYING CLAUSES AND SEPARABLE LIMITATIONS.

287. Modifying clauses..... 229
288. Clause against anticipation..... 230
289. Separable limitations..... 230

CHAPTER XXVIII.

CO-TENANCY IN GENERAL.

SECTION		PAGE
290.	Joint tenancies distinguished from tenancies in common	232
291.	History of presumption	232
292.	Presumption in this country	233
293.	Conveyance to several and their representatives	234
294.	Tenancy by entirety	234
295.	What property may be held in co-tenancy	235
296.	Divisions not creating co-tenancies	235

CHAPTER XXIX.

TENANCY IN COMMON.

297.	Definition	237
298.	Creation by grant	237
299.	Creation by descent	238
300.	Widow's dower	238
301.	Creation by two grants of some property	239
302.	Grant of acreage out of large tract	239
303.	Partnership land	239
304.	Incidents of tenancy in common	240
305.	Mutual rights	240
306.	Rights to use and possession	241
307.	Liability of one tenant for rent	242
308.	Right of one tenant to purchase at foreclosure	242
309.	Rights of action	243

CHAPTER XXX.

JOINT TENANCY.

310.	Creation	244
311.	Nature	245
312.	Unity of time	246
313.	Incidents	246
314.	Examples	247
315.	Joint mortgages	247
316.	Lapse	248

SECTION PAGE
317. Conveyance of joint estates..... 248
318. Severance of an estate by joint tenancy..... 249
319. Effect of modern statutes on an estate by joint tenancy 250

CHAPTER XXXI.

COPARCENARY.

320. Definition 251
321. Nature 251
322. Owner in coparcenary with himself..... 251
323. Mutual rights—Conveyances..... 252
324. Present law..... 252

CHAPTER XXXII.

ESTATES ARISING BY MARRIAGE IN GENERAL.

325. Effect of marriage..... 254
326. Estates by entirety..... 254
327. The freehold estates of dower and curtesy..... 255
328. Conveyances in fraud of marital rights..... 255
329. Curtesy and dower in wild lands..... 256
330. Community property..... 256
331. Protection of rights of wife in community property 257

CHAPTER XXXIII.

CURTESY.

332. History and definition..... 258
333. Curtesy in the United States..... 259
334. Initiate and consummate..... 259
335. Requisites of an estate by curtesy..... 260
336. Nature of curtesy—Transfer..... 261
337. Seisin fundamental to curtesy..... 263
338. Incidents of an estate by curtesy..... 264
339. Effect of disseisin..... 264
340. Same subject..... 265
341. To what estates curtesy will attach..... 266

SECTION PAGE

342. The estate by curtesy cannot be barred by will of the person giving the lands to the wife..... 267
343. An estate by curtesy may be barred by an intention so expressed when lands are conveyed in trust to uses 267

CHAPTER XXXIV.

DOWER.

344. Dower defined and explained..... 269
345. Origin of dower..... 270
346. Three requisites of dower..... 270
347. Nature of dower..... 271
348. Same subject..... 272
349. Nature of dower before vesting further considered—Legislative control..... 273
350. Aliens 274
351. Dower in mortgaged property..... 274
352. Dower in mortgaged property on foreclosure 275
353. Dower in mortgaged property on transfer of equity in mortgagee..... 275
354. To what does the dower attach?—Wild lands..... 276
355. Nature and quality of the estate subject to dower.. 276
356. Seisin of husband as requisite to dower..... 277
357. On exchange of lands..... 278
358. Dower in equitable estates..... 279
359. Dower in determinable estates..... 279
360. The law will not grant dower out of a dower estate 280
361. How to bar dower..... 281
362. Loss of dower by dedication..... 282
363. Loss of dower by adultery or divorce..... 282
364. Jointure to bar dower..... 283
365. Gift by will in lieu of dower..... 284
366. Dower barred by adverse possession..... 285
367. Assignment of dower in general..... 285
368. Two methods of assignment..... 285
369. Proceedings to enforce assignment..... 286
370. Time of estimating value—Improvements..... 287
371. Same subject..... 288

CHAPTER XXXV.

HOMESTEAD EXEMPTIONS.

SECTION		PAGE
372.	Origin of homestead	290
373.	Validity of homestead laws	290
374.	Validity and effect of repeal	291
375.	Beneficiaries	291
376.	Head of a family	292
377.	Obligation to support requisite of head of a family	292
378.	Relationship constituting family	293
379.	When status must exist	294
380.	Wife as head of a family	294
381.	Children	295
382.	Effect of divorce	295
383.	Residents	296
384.	Estate to support homestead	297
385.	Leasehold interest	298
386.	Purchaser	298
387.	Equitable interests	299
388.	Co-tenancies—Partnership property	300
389.	Occupancy	301
390.	Land used in part as residence	301
391.	Land attached to residence	302
392.	Proceeds of sale	303
393.	Claims excepted	303
394.	Loss by waiver, sale or otherwise	304

PART II.

USE AND ENJOYMENT INCIDENT TO OWNERSHIP OF LAND.

CHAPTER XXXVI.

RIGHTS APPURTENANT TO LAND.

395.	Appendant and appurtenant distinguished	306
396.	The word "appurtenant"	307
397.	The nature of things that may be appendant or appurtenant to land	308
398.	Transfer of rights appurtenant	309

SECTION PAGE
399. Ownership above and below surface..... 309
400. Aerolites belong to the owner of the land..... 310
401. Incidents that pass with a grant of minerals..... 310
402. Rule when tree extends over the property line..... 312
403. Trees on boundary line..... 314

CHAPTER XXXVII.

FRUITS OF THE SOIL.

404. Two classes of products of the soil—Fructus naturales and fructus industriales..... 315
405. Rule as to natural fruits of the soil..... 316
406. Annual crops or emblements are generally regarded as personalty..... 317
407. On death of testator..... 318
408. On sale of the realty..... 318
409. Husband and wife..... 318
410. Landlord and tenant..... 319
411. Trespassers 319
412. Crops covered by mortgage..... 319
413. Trees and shrubbery..... 321
414. Standing forest trees are a part of the realty..... 322

CHAPTER XXXVIII.

WASTE.

415. Definitions 323
416. Equitable waste..... 323
417. Liberal construction of waste in this country..... 324
418. Tenant's implied duty to repair..... 324
419. Liability of tenant at will to repair..... 325
420. Cutting timber..... 325
421. Alterations in premises..... 326
422. Changing nature of use..... 327
423. Removal of structures erected by tenants..... 328
424. Fire 328
425. Mines 329
426. Same subject..... 329

SECTION PAGE
427. Abandonment of mines..... 330
428. Actions 331

CHAPTER XXXIX.

BOUNDARIES.

429. Importance of certainty in boundaries—Ambiguities 332
430. Patent and latent ambiguities..... 332
431. Boundaries fixed by acts of the parties..... 333
432. Evidence to locate boundaries..... 334
433. Statutory methods of determining boundaries..... 335
434. Natural monuments..... 335
435. Whether monuments, courses or distances prevail... 336
436. Whether line runs to center of monument..... 336
437. Measuring from building..... 337
438. Boundary on highway..... 337
439. Boundary on street where distances reach only to edge of street..... 338
440. Where street is on edge of lot and wholly on land of one owner..... 339
441. Boundary on street not constructed..... 340
442. Title to highway never appurtenant to abutting... 340
443. When street vacated..... 340
444. Boundary on river..... 341
445. Boundary on lake or pond..... 341
446. Division of land under water..... 342

CHAPTER XL.

FENCES.

447. Nature of obligation to fence..... 343
448. Creation of obligation to fence..... 343
449. By custom..... 344
450. By prescription..... 344
451. As covenant running with land..... 344
452. Fence along highway..... 345
453. Railroad fences..... 345
454. Proper kind of fence..... 346
455. Statutes 346

PART III.

USE AND ENJOYMENT OF LAND OF ANOTHER.

CHAPTER XLI.

NATURAL RIGHTS TO AIR AND WATER.

SECTION		PAGE
456.	Natural right defined	347
457.	Right to light by prescription	347
458.	English rule of acquisition of easement of light by prescription	348
459.	Right to light by express or implied agreement	348
460.	No right to light by prescription in this country	349
461.	Right to air free from smell and noise	350
462.	Priorities in right to freedom from smell and noise	350
463.	Acts proper in certain localities	351
464.	No prescriptive right till injury done	352
465.	Actions to prevent prescription	352
466.	Percolating water	352
467.	Same subject—Malice	354
468.	Underground streams	354
469.	Surface water	354
470.	Same subject—Effect of artificial structure	356
471.	Right to reasonable use of stream	356
472.	Test of reasonable use	357
473.	Right to use stream for domestic or business purposes	358
474.	Rights by prescription	359
475.	Doctrine of prior appropriation	359
476.	Right to pollute or make deposits in stream	360
477.	Rights in ice	360

CHAPTER XLII.

LATERAL AND SUBJACENT SUPPORT.

478.	Right of adjacent support	361
479.	When land is not damaged	361
480.	Prescriptive right to adjacent support—Abutters on highway	362

SECTION PAGE
481. In case of intervening owner..... 363
482. When damage does not immediately follow excavation 364
483. Nature of right to subjacent support—Rule of damages 364
484. Effect of existence of buildings..... 365
485. Liability does not depend on negligence..... 365
486. Right of support subordinate to rights in percolating waters 366
487. Liability for removing solids in solution—Quicksand 367

CHAPTER XLIII.

EASEMENTS.

488. Easement defined..... 369
489. Kinds of easements..... 369
490. Easement in gross..... 370
491. Presumption against easement in gross..... 371
492. Easements by custom in England..... 371
493. Easements by custom in this country..... 372
494. Rights by prescription..... 372
495. Requisites of right of way..... 373
496. Way by grant for what purpose..... 373
497. Way by prescription for what purpose..... 373
498. Way to what place..... 374
499. Way by necessity..... 375
500. Repairs or grade of way..... 376
501. Gate, bridge or buildings on way..... 376
502. Right to drain..... 377
503. Right to pond water..... 378
504. Mill Acts..... 379
505. Right to let eaves drip on land of another..... 379
506. Pews 379
507. Rights in cemeteries..... 379
508. Abandonment of easement..... 380
509. Abandonment of way..... 380
510. Merger 381

CHAPTER XLIV.

LICENSES.

SECTION		PAGE
511.	Licenses distinguished from easements	383
512.	Forms of licenses	383
513.	Implied license to purchaser of chattel to get it	384
514.	Revocation of licenses—Distinction between licenses creating and extinguishing easements	384
515.	Same subject	385

CHAPTER XLV.

PROFITS.

516.	Profits distinguished from easements	386
517.	Common appendant	386
518.	Rights appurtenant	386
519.	Common of pasture	387
520.	Other commons	388
521.	Creation by custom	388
522.	Profit by prescription	388
523.	Prescriptive right to fish in private waters	389
524.	Effect of transfers of land	389

CHAPTER XLVI.

PARTY WALLS.

525.	Ownership	391
526.	Rights to use	391
527.	Alterations in party walls	392

CHAPTER XLVII.

RENT.

528.	Definition	394
529.	Kinds of rent	394
530.	Attornment	395
531.	Distress	396

CHAPTER XLVIII.

COVENANTS RUNNING WITH LAND.

SECTION		PAGE
532.	In general	397
533.	Only covenants under seal run	397
534.	Relating to things not in existence	398
535.	Whether heir is bound	398
536.	When covenant runs	399
537.	Privity	400
538.	When courts will not enforce covenant	400
539.	Equitable easement	401
540.	Same subject	401

PART IV.

ACQUISITION OR TRANSFER OF TITLE.

A. DURING LIFE WITH CONSENT OF OWNER

CHAPTER XLIX.

FORMS OF CONVEYANCES.

541.	In general	403
542.	Feoffment	403
543.	Ancient form of deeds	404
544.	Conveyance by special custom	404
545.	Deeds poll and indentures	405
546.	Fines and recoveries	405
547.	Deed of bargain and sale	406
548.	Consideration	406
549.	Signature	407
550.	Origin of the seal	407
551.	History of seal	407
552.	Form of seal	408
553.	Stamped paper	409
554.	Seal imports consideration	409
555.	Present value of seal	410
556.	Materials used in deeds	410
557.	Short statutory forms	411
558.	Alterations in deed	411

CHAPTER L.

SURRENDER AND RELEASE.

SECTION		PAGE
559.	Definition	413
560.	Effect of the Statute of Frauds	413
561.	By operation of law	413
562.	Same subject	414
563.	Orally with change of possession	415
564.	Operation and effect	415
565.	Must operate at once	416
566.	Releases	416

CHAPTER LI.

DELIVERY AND ACCEPTANCE.

567.	Necessity of delivery	418
568.	Oral statement of delivery	418
569.	Delivery in escrow	419
570.	To whom delivery in escrow may be made	419
571.	Conditional delivery	420
572.	Rights of intervening grantees in case of conditional delivery	420
573.	Delivery to third party	421
574.	Delivery to agent	422
575.	When grantor retains control	422
576.	Recording as delivery	423
577.	Acceptance	424

CHAPTER LII.

OTHER ESSENTIALS TO VALID CONVEYANCE.

578.	Execution defined	426
579.	Who may convey land—Infants and lunatics	426
580.	Who may convey land—Disseisee	426
581.	Aliens	427
582.	Deed to grantor	428
583.	An incorporeal hereditament	428
584.	Exception of strip subject to easement	428

CHAPTER LIII.

ABSTRACTS OF TITLE.

SECTION		PAGE
585.	Importance	430
586.	Abstract offices	430
587.	Method of examining title	431
588.	Title passing on death	433
589.	Liens	434
590.	Liability of examiner of title	435

CHAPTER LIV.

COVENANTS OF TITLE.

591.	History of covenants of title	437
592.	Meaning of covenants	437
593.	Title defined and explained	438
594.	The covenant of seisin	439
595.	The covenant of the right to convey	441
596.	The covenant against incumbrances	441
597.	Same subject—Meaning of an incumbrance	442
598.	Easements as incumbrances	443
599.	Same subject—Effect of breach of covenant against incumbrances	443
600.	The covenant for quiet enjoyment	445
601.	The covenant for further assurance	445
602.	The covenant of warranty	446
603.	History of warranties	448
604.	Same subject—General and special warranties	449
605.	Collateral warranty	450
606.	What constitutes a breach of covenants of warranty	450
607.	When breach occurs—English rule	451
608.	When breach occurs—American view	452
609.	Whether warranty runs with land	453
610.	Liability of prior covenantors—Effect of release of one	453
611.	Intermediate grantors	454
612.	Same subject	455
613.	When covenant runs with land	456
614.	Same subject	456

SECTION PAGE
615. Damages 457
616. Adverse possession as breach of covenant..... 457
617. Enforcement in equity..... 458
618. Estoppel 458
619. Title by estoppel..... 460
620. Feeding the estoppel..... 461
621. Application of estoppel..... 461

CHAPTER LV.

RECORDING LAWS.

622. Recording laws purely statutory..... 463
623. Where records kept and how entered..... 463
624. Effect of mistake in record..... 465
625. Error in grantor's middle name..... 467
626. Proof of title from records..... 467
627. Subsequent purchaser's rights..... 467
628. A mortgagee is regarded as a purchaser under the recording laws..... 468

CHAPTER LVI.

TORRENS SYSTEM OF LAND REGISTRATION.

629. History 470
630. Constitutionality 470
631. Purpose and effect..... 471
632. Operation 472
633. When useful..... 472
634. Power of court over defective titles..... 473
635. Typical case for registration..... 474

CHAPTER LVII.

DEDICATION.

636. Nature and form..... 475
637. Principles 476
638. For what time..... 476
639. For what purposes..... 477

SECTION PAGE
640. Conditional or limited dedication..... 477
641. Acceptance 478
642. Same subject..... 479

CHAPTER LVIII.

PUBLIC LANDS.

643. Survey of the public lands..... 480
644. Fractional sections..... 482
645. Rights of riparian owners..... 484
646. Sale of public lands..... 485
647. Same subject—Governmental grants for educational purposes 485

CHAPTER LIX.

POWERS.

648. Definition 487
649. Terminology 487
650. Exclusive power..... 488
651. Effect of Statute of Uses..... 488
652. Exercise must be in accordance with power..... 489
653. Who may exercise power..... 489
654. Exercise by gift in will..... 489
655. Same subject..... 490
656. Same subject..... 491
657. Excessive execution..... 491
658. Non-exclusive power..... 492
659. Defective execution..... 492
660. Illusory appointment..... 493
661. Fraudulent appointment..... 493
662. Same subject..... 494
663. Abatement of power..... 495
664. Lapse of power..... 495
665. Release of power in general..... 495
666. Release of power appendant..... 496
667. Release of power in gross..... 497
668. Extinguishment of special power in gross..... 497

SECTION PAGE
669. Same subject—Tortious conveyances..... 498
670. Same subject—Special powers in gross..... 500
671. Extinguishment of power to appoint by will..... 500

B. DURING LIFE WITHOUT CONSENT OF OWNER

CHAPTER LX.

IN GENERAL.

672. Original acquisition..... 502
673. Eminent domain..... 503
674. Right to take easement by eminent domain..... 504
675. Tax sales..... 504
676. Bankruptcy 505

CHAPTER LXI.

FORFEITURE FOR CRIME.

677. History—Rebels 507
678. Confiscation sale..... 507
679. When title passes..... 508
680. Forfeiture for crime today..... 508

CHAPTER LXII.

SALES ON EXECUTION.

681. Proceedings 509
682. Appraisal 510
683. Conduct of sale..... 510
684. Purchasers 511
685. Deed 511
686. Vacating sale..... 512

CHAPTER LXIII.

PARTITION.

687. Nature 513

SECTION PAGE
688. Who is entitled to partition..... 513
689. Accounting, owelty, sale..... 514

CHAPTER LXIV.

ADVERSE POSSESSION.

690. Origin of title by prescription..... 516
691. Nature of claim..... 516
692. Knowledge of owner..... 517
693. Easements by prescription..... 517
694. Same subject—In the United States..... 518
695. Defenses against acquisition of easements by prescription 519
696. Constructive possession—Color of title..... 519
697. Requisites of constructive possession..... 520
698. Nature of claim under paper title..... 521
699. Amount of land which can be claimed by constructive possession..... 522
700. Color of title will not embrace land of owner without notice 522
701. Successive constructive possessions..... 523
702. Agency of relative for constructive possession..... 523
703. Projecting eaves 524
704. Transfer by disseisor..... 524
705. Disseisin by election..... 525
706. Grantee under unrecorded deed..... 525
707. Between husband and wife..... 525
708. Remainders or reversions..... 526
709. Possession under a lease..... 527
710. Effect of deed by lessee..... 527
711. Prescription between states and nations..... 528
712. Municipalities 528
713. Estoppel against municipalities..... 529
714. Tacking adverse interests..... 529
715. Interruptions 530
716. Mere protest not an interruption..... 532
717. Interruption by tenant insufficient..... 532
718. Disabilities 533
719. Disabilities in case of easements..... 534

CHAPTER LXV.

ACCRETION, ALLUVION AND RELICTION.

SECTION		PAGE
720.	Definitions	535
721.	Alluvion, avulsion and reliction	535
722.	Where land submerged can be identified	537
723.	Reasons for rule	537
724.	Right to alluvion a vested right	538
725.	Effect of artificial structures	538
726.	Islands	539
727.	Same subject	539
728.	Ponds	540
729.	Division of flats	540
730.	Extension of public street	541
Bibliography		542
Quiz Questions:		
	Part I	543
	Part II	564
	Part III	568
	Part IV	573
Leading Illustrative Cases, Table of Contents		583
Index		891

LAW OF REAL PROPERTY

BY

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PART I

NATURE OF OWNERSHIP IN LAND

CHAPTER I.

ORIGIN AND TERMINOLOGY OF RIGHTS IN LAND.

1. **Classes of property—Movable and immovable—Tenements and hereditaments.**—In the infancy of civilization property consisted almost solely of visible and tangible articles, such as cattle, sheep, buildings, and land, now termed *corporeal,* as distinguished from *incorporeal* property, as debts, rights in action, and the like, so common to modern civilization. Of tangible, or corporeal, property, there are plainly two classes: thus, sheep, cattle, and articles that may be transported from place to place, or consumed, on the one hand; and land, houses, and the like, which are permanent and stationary in character, on the other hand; or, *movable* and *immovable property.* This division of property

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into movable and immovable was made in the early years of civilization and continues to be one of the most fundamental classifications of property. The history of the Anglo-Saxon race has added to it many important circumstances.[1]

The system of tenures, or holdings, established under the feudal system which was, as will be noted in Chapter III of this article, a property system introduced into England by the Normans in the eleventh century, applied only to land, or immovable property; sheep and cattle and other movable property were not of sufficient importance, or were too easily disposed of to bring them under the system, and their control and ownership by individuals were regarded as absolute.[2]

"Lands, houses, and immovable property—things capable of being held in the way above described—were called *tenements,* or *things held.* They were also denominated *hereditaments,* because, on the death of the owner, they descended by law to his heir. So that the phrase, *lands, tenements,* and *hereditaments,* was used by the lawyers of those times to express all sorts of property of the first or immovable class; and the expression is in use to the present day."[3] The other class of property, *movable,* was designated as goods or chattels, terms still in common use.

2. **Origin of the terms real property and personal property.**—The most important division of property

[1] Williams, Real Property (6th ed.), pp. 1, 2.
[2] Co. Lit. 191a, note.
[3] Williams, Real Property (6th ed.), p. 5.

is into real and personal. This distinction owes its rise historically to the decline of the feudal system, as there was no such distinction under that system. The distinction first became noticeable on account of the difference in the remedy for possession of property taken away from the owner. The remedy in the case of the land was to return to the owner the land itself, but in the case of a chattel the remedy was against the person who had taken it away.

So that, growing out of the remedies applicable to the recovery of the two sorts of property, and the actions therefore, *real* actions and *personal* actions, lands and tenements came to be called *real property,* and goods and chattels *personal property.*

3. **Corporeal and incorporeal property.**—In addition to the classification of property into movable and immovable, personal and real, there is another division to be noted, that of *corporeal* and *incorporeal.*[4] By corporeal property is meant visible and tangible property, as a house, a parcel of land, chattels, and the like; while an annuity, or annual rents[5] derived from land, is incorporeal property, since it has only a mental existence, is intangible, invisible, and only exists in contemplation of law. In ancient times writing was not commonly employed, as very few people could write, so that the distinction between these two classes of property became important in the manner of their transfer. Corporeal and

[4] The misleading nature of this distinction is discussed in Digby, History of Real Property, App. to Part I (11) note, LEADING ILLUSTRATIVE CASES.

[5] See Chap. XLVII.

tangible property was delivered from one to another by actual transfer, called livery of seisin, or by a symbolical delivery in the case of land or bulky articles; while a transfer of incorporeal property, not being capable of this actual transfer in the presence of witnesses, had to be made in writing.[6] It is with corporeal property, and that class of it known as real property or hereditaments, since it descends to the heir on the death of the owner, that we are now concerned.

4. **Other terms used to designate corporeal hereditaments, or land.**—A number of words and phrases that have come to have general significance and meaning and are commonly used in the law of real property need some explanation to enable the student to comprehend their meaning. The word *messuage* is used by the profession as meaning house, and while formerly considered as having a more comprehensive meaning, the two words are now deemed nearly synonymous, each comprising not only buildings, but also outbuildings, the orchard, curtilage, or yard around the house, and perhaps the garden surrounding the house, when used in a legal instrument.[7]

The word *tenement* is also used in law to designate a house, and is the regular synonym following the word *messuage* in a lease, but whenever the sense requires it will be given a more comprehensive meaning, including land generally.[8]

[6] Gilbert, Tenures, p. 77.

[7] Williams, Real Property (6th ed.), p. 13; Cole v. West London & Crystal Palace Ry. Co., 27 Beav. 242 (Eng.); Smithson v. Cage, Cro. Jac. 526 (Eng.).

[8] 2 Blackstone, Commentaries, pp. 16, 17, 59.

The word *land,* in its legal signification, includes all soil or earth generally, although in its strict and primary import it referred to arable land. But in our law it includes everything attached to it or constructed upon it, as houses, bridges, buildings of every description; and a grant of a parcel of land carries with it not only the things upon the surface of the land, but also everything above and below the surface, from the center of the earth to the highest heavens, the maxim being, *cujus est solum, ejus est usque ad coelum* (the landowner owns to the sky).[9] So that a pond of water passes with the land as land covered by water, and the mines and minerals below the surface pass with a grant of the land, except gold and silver, which from immemorial times were claimed by the crown. But this exception does not prevail in America.[10]

The extensive meaning of the term *land* may be limited and controlled by the context, as where the term is used in plain contradistinction to houses, it will not include them. And minerals under land may be expressly excepted so as not to pass by a grant of the land, in which case the reservation would

[9] Williams, Real Property (6th ed.), p. 14.

[10] In most of the royal charters to the colonies, "all mines" were expressly included in the grants, with a reservation in some cases of a fourth or fifth of gold and silver ores.

The rights of owners of mines in America are governed by the rules of the common law, but the reservation to the state of the precious metals never obtained in this country to any extent. The right to such mines on the public lands in California is held to be vested in the United States merely as an incident to the ownership of the soil and not by any sovereign prerogative. The States of Pennsylvania and New York, by statute, assert prerogative rights over mines to the extent of the English rule.

Williams, Real Property (6th ed.), p. 3; Kent, Commentaries, 378, note; Boggs v. Merced Min. Co., 14 Cal. 279.

include incidentally the right to use the land to get out the minerals, and the duty to leave sufficient support for the land.[11]

The word *premises* is commonly used in law as meaning what has gone before, as, where certain facts have been recited in an instrument, and then follows, "in consideration of the *premises,*" this means in consideration of the facts just stated. The word is not commonly used as designating property, unless a description has preceded its use in the same instrument.[12]

5. **Property and title distinguished.**—It should be noted that the property which a man has in land may be distinguished from his title. The property is the present interest in the land whether he has a complete or a partial ownership in it, while his title indicates how he got the land, whether by will or by gift or by grant. If one has the entire interest in a piece of property he has what is known as a fee, while if he has an interest less than a fee he may have some estate, as a life estate. This is his "property." If he desires to sell this property the buyer will ask what is his "title" and his title involves a statement of the conveyances or chain of deeds by which he acquired his title as explained in Chapter LIII of this article.

[11] Jarman, Wills (4th ed.), p. 777; Earl of Cardigan v. Armitage, 2 B. & C. 197 (Eng.); Livingston v. Moingona Coal Co., 49 Iowa 369; Yandes v. Wright, 66 Ind. 319.

[12] Williams, Real Property (6th ed.), p. 15.

CHAPTER II.

REAL AND PERSONAL PROPERTY DISTINGUISHED.

6. **In general.**—The terms real property and personal property are now more common than in the ancient designations; while the latter class has grown into almost as much importance as the former. Many sorts of property which are in a way fixed and immovable, as shares of stock in railways, are yet personal property, while following the old system, titles of honor are considered as real property since in ancient times they were annexed to the ownership of certain lands.[13] On the contrary, a lease of lands or houses for a term of years, was, and is, considered as personal property, since the tenant's possession, though for a long term of years did not make him the owner of the land, or make the tenant liable to any of the feudal dues exacted from those holding by other grants, or descend to his eldest son as heir at law, but was merely a chattel interest to the use of the land.[14]

7. **Crops.**—Growing crops planted by the owner of the soil are real estate; but annual crops planted by a tenant are personal property, although they may become real estate if the tenancy ceases.[15] And

[13] Wright's Tenures, p. 142; Williams, Real Property (6th ed.), p. 6, note.

[14] 2 Blackstone, Commentaries, 16, 384; 3 Same, 144; Jenkins v. McCurdy, 48 Wis. 628, 4 N. W. 807, LEADING ILLUSTRATIVE CASES.

[15] See § 406.

so trees planted by a tenant may be personal property especially when planted for sale as in the case of a nursery.

8. **Fixtures.**—A fixture is a chattel, which, by physical annexation to the real estate, has become itself real estate. It is necessary that the article shall be physically annexed and most of the cases concerning fixtures arise in considering what is a sufficient annexation. A good example of annexation is the case of buildings,[16] though resting only on timbers or blocks, also fences.[17] The courts will sometimes regard even machinery in a machine shop[18] as fixtures. The status of property as to whether a fixture or not may be controlled by special agreement between the parties so that one party may remove the property in question, and any such agreement will be binding,[19] although it is sometimes said that this doctrine cannot apply where the thing annexed is such that it is entirely deprived of its character as personal property,[20] or where the effect would be to defeat the purpose of a statute.[21]

This whole question is taken up more fully in the article on Landlord and Tenant.

9. **Heirlooms.**—Chattels, under certain circumstances, partake of the nature of real property and so descend to the heir. These are called heirlooms

[16] Ogden v. Stock, 34 Ill. 522.

[17] Emrich v. Ireland, 55 Miss. 390, Mott v. Palmer, 1 N. Y. 564, LEADING ILLUSTRATIVE CASES.

[18] Pierce v. George, 108 Mass. 78; Snow v. Smith, 86 Vt. 58, 83 Atl. 269, LEADING ILLUSTRATIVE CASES.

[19] Case Manufacturing Co. v. Garven, 45 Ohio St. 289, 13 N. E. 493.

[20] Campbell v. Roddy, 44 N. J. Eq. 244, 14 Atl. 279.

[21] Havens v. Germania Insurance Co., 123 Mo. 403, 27 S. W. 718.

and have long been recognized in Europe as interests in real estate; but they are not recognized in this country. As heirlooms go to the heir, he therefore may have an action for them at common law, but the right to an heirloom is based upon custom rather than upon the common law. An heirloom, being a chattel, is not necessarily attached to the freehold, but it goes to the heir from immemorial custom without the express intention of the parties.

A very restricted list of particular chattels like armor, pennons, and ensigns of honor are called heirlooms. The word is derived, according to Blackstone, from the Saxon "loom," meaning limb, or member, and so signifies a limb or member of the inheritance. They are transferable by person during life, but a bequest of heirlooms could be avoided by the person to whom the realty has descended or been devised.

10. **Manure.**—A number of rules fixing the nature of property grew up at the common law, and have come down to modern times, one of which is, that manure is real property and belongs to the land. So manure produced upon the farm by the products of the farm is regarded as appurtenant to it, and is real estate which passes with a sale of the farm itself to the purchaser.[22]

Suppose, for example, a farmer keeps a dozen cows which have produced a large pile of manure in the barn cellar, and he sells his farm by a deed which does not mention the manure. It will pass, neverthe-

[22] Nason v. Tobey, 182 Mass. 314, 65 N. E. 389, LEADING ILLUSTRATIVE CASES.

less, and the instant the deed is delivered it belongs to the purchaser. Therefore, a tenant on land has no right to sell the manure as personal property, and if he does so it is regarded as committing waste. This rule was the result of an attempt to further good husbandry, and is prolific of many disputes in modern times. In some states the same rule exists as to straw; all straw stacks passing with the realty, as it is regarded as of no value except to convert into manure to enrich the soil. Where it has a commercial value the rule might be different. The rule does not extend to hay, as it has a commercial value.[23]

11. **Mines.**—In the case of mines or quarries there is frequently a double interest, one in the ore or other product, and the other in the soil itself. So if the minerals in a particular locality are granted the grant carries an estate in the minerals as real estate. There are reciprocal rights to support from the mine owner and the right of the mine owner to object to the imposing of additional weight on the soil which will be considered later.[24]

12. **A room in a building.**—One may have an ownership of a single chamber in a dwelling house and may protect his rights by an action of ejectment, although if the house or the chamber is destroyed the owner might thereby lose his interest in the land on which it stood.[25]

13. **Stock in corporations.**—The interest of a corporation in real estate is represented by its shares

[23] Brown v. Thurston, 56 Me. 126; Powell v. Rich, 41 Ill. 466.
[24] See § 483.
[25] Mott v. Palmer, 1 N. Y. 564, LEADING ILLUSTRATIVE CASES.

and it is well settled that these shares are personal property and not real estate, although the corporation itself owns real estate. There are some early cases to the effect that a canal or waterworks company or turnpike company created solely for the purpose of holding and using real estate may issue shares, which shares become real estate. But these cases are clearly exceptions to the ordinary rule.

14. **The same property may be either real or personal.**—The same piece of property may be either real or personal according to the circumstances. What is naturally a chattel may become fixed to the soil, while what is naturally fixed to the soil may be separated and become a chattel. Thus a house may be built of timber which is personal property and as it is put into the house it becomes real estate. On the other hand the parties may by contract agree that a house though built by one man on the land of another may remain personal property. So timber when standing is real property, but as soon as it is cut it becomes personal property. The same is true of ore or other products of mines. So an engine or other machinery, which is personal property, may be so built into a factory or other building that it becomes a part of the factory itself, in which case it is real estate, while usually machinery which can be separated from the building in which it is placed, remains personal property.

15. **Who are interested in distinguishing between real and personal property.**—The questions above considered arise where interests in property are adverse; as where a farmer sells his farm to another

and there is a dispute as to what passes with the farm, or where he places a mortgage on it and there is lack of agreement as to what the mortgagee takes on foreclosure, or where the farmer rents his farm to a tenant and it must be settled at once what the tenant gets under his lease. Similar questions are asked as to what passes to the remainderman who takes on the death of a life tenant. The distinction is also important where the landowner dies without leaving a will, as then the real property goes to his heirs, while personal property is distributed by the administrator among the next of kin of the intestate, or, under certain modern statutes, the personal property is taken to pay debts and obligations, while the real property goes to the heirs, unless that also is required to satisfy debts.

CHAPTER III.

THE FEUDAL SYSTEM.

16. **The feudal system in Europe.**—The feudal system was first established by the Goths and Vandals when they overran and subdued Rome. Under this system land was made the basis of government, and all land was regarded as held by the king. As these barbarian hordes came down from the north of Europe they took possession of all property, both real and personal, belonging to those they subdued. The king, or chief, divided the property among his followers; the real property, or land, was not given to them outright, but was allotted to the chief men and soldiers, in large parcels; these "allotments were called *feoda,* feuds, fiefs, or fees: which last appellation in the northern language signifies a conditional stipend or reward." The condition annexed to these holdings was that the possessor should do service faithfully, both at home and in the wars, to him who gave them. The holder had to take an oath of fealty to do such services and on his failure to fulfil the condition the lands again reverted to the chief or king who had granted them. The chief men to whom the large tracts were given, called tenants in capite, again divided the land among their immediate followers on the same principles, granting the use of the land, while reserving the title. The same

relation as to rendering military service or returns for the land was kept up as between the king and tenant in capite.[26]

The feudal system originating with the Germans and other Teutonic tribes who overran Europe between the fifth and the tenth centuries was carried by the Normans into France; and by William the Conqueror, the Norman king who conquered England in the year 1066, it was imposed upon the Saxon people. It existed in England for many centuries, but the main hardships of the system were gradually ameliorated until today there is very little trace of it left in the law.

17. **Introduction of the feudal system into England.**—By the Norman Conquest of England, in 1066, the lands formerly owned by the Saxons were for the most part confiscated, and re-granted by William the Conqueror to his soldiers under the principles of the feudal system; that is, the lands instead of being held freely, as allodial lands, which are owned absolutely without recognizing any paramount lord, were held under a sort of rental, consisting in the performance of military service to the immediate superior of the holder, until such service reached the king, or lord paramount, who was deemed to be the owner of all the land. This system was soon applied to all the lands in England, both those confiscated and those that were allowed to remain in the hands of their former Saxon owners;[27] so that in a short

[26] 2 Blackstone, Commentaries, pp. 45, 48; Wright's Tenures, pp. 61, 62.

[27] Williams, Real Property (6th ed.), p. 4; Stubbs, Constitutional History of England, vol. I, chap IX.

time after the Norman Conquest, the principle became firmly established, that there were no free lands, but that all lands were mere holdings, tenures (from *tenir,* to hold), or estates subject to the claims of the lord paramount or king, in whom the title and right of disposition rested.

The Saxons had held their land in England by allodial tenure; that is, absolutely, without recognizing any lord, as land is held in this country today, but the unsettled state of the country rendered it desirable that the land owners have some one to whom they could look for protection in their possession and they were in many cases doubtless willing to pay the services imposed by the feudal system. As the rapacity of the lords made these services more harsh the system was gradually done away with.

18. **Feudal fruits and privileges.**—The feudal system gave rise to many estates and interests differing widely from each other, among which were:

Reliefs. These were payments to be made to the lord by one on taking possession of his inheritance after the death of the former owner.

Wardship. This was the right of the lord to take land into his own custody during the minority of the heir. It was most oppressive, for the lord took the profits of the land. As a corollary of the right of wardship was the right of the lord to direct the marriage of the ward, and if the ward refused to carry out the lord's contract he forfeited the value of his marriage to the lord.

Fine. A fine was a sum paid to the lord on trans-

fer of the feud (the allotment from the lord) after the feuds became transferable under the Statute of Quia Emptores (18 Edw. I, c. 1).

The only incident of the feudal system which is still important today was that of escheat which resulted in a forfeiture of the lands to the lord on failure of heirs, or when the owner became convicted of certain high crimes. In the latter case, his blood became corrupted in law so that his heirs could not inherit. Corruption of the blood is not possible in this country on account of the provisions of the Federal Constitution (Art. III, § 3). It frequently happens, however, that persons die without heirs of any kind so that their properties revert to the state, which, for that purpose, stands in the place of the lord under the feudal system.

19. **Influence of the feudal system on individual rights.**—The idea of individual ownership in land was complicated by the feudal system which was based on the idea that all the land in the kingdom belonged to the king and that it was only held from him by certain of his nobles who rendered certain services to the crown in payment for the use of the land. The nobles in their turn parcelled out the land to the farmers, called villeins, who tilled the soil and rendered various services to the nobility. The services demanded were so harsh and unreasonable and became through the rapacity of the nobles so burdensome that the feudal system was gradually altered and one oppressive feature after another was eliminated. The rights of the nobility were gradually limited and the rights of the farmers who tilled the

soil were increased by various statutes until the modern idea of ownership of the soil became firmly established. Thus it is to be noted that absolute ownership in real estate is not at all a matter of course, but is of historical growth and is a heritage which the tillers of the soil have won only after centuries of struggle. It is quite necessary in order to understand the modern law of real property and the modern deeds to understand the history and growth of the notion of individual ownership which today is assumed as a matter of right.

20. **Decline of the feudal system.**—Under the feudal system land was known by the name of tenements and this designation obtained until the feudal system began to decline, commercial systems to spring up, and until the growth of liberty among the people demanded a change in the ideas prevailing as to the ownership of land. The final blow at the feudal system was not given until the restoration of Charles II, when a statute abolished most of the forms of tenures theretofore existing and simplified the law as to land, though the old forms still remained. This statute[28] abolished tenures by knight service and many of the feudal restraints upon alienation or conveyance of land, and reduced nearly all tenures to free and common socage. By this was meant tenure by rendering some conventional service not military. It was upon such a grant that the land in most of the American colonies was given to the colonists by the king, who simply demanded fealty in return.

[28] 12 Charles II, c. 24.

CHAPTER IV.

MANORS.

21. **Nature and origin.**—Manor was the name given to the land occupied by the ancient barons or nobles which they divided commonly as follows: part of it was used as the mansion house; part was occupied by the villeins of the lord who held small parcels for cultivation; the rest was granted to free-holders subject to certain rents. The barren lands were the lord's waste or common on which the cattle of the tenants were allowed to pasture. Each tract of land thus subdivided was called a manor. Manor courts were originally held by the lord to decide various questions arising between his tenants, which courts at one time achieved considerable power. The name manor is of Norman origin, but the estate to which it is given existed in its essential character long before the Conquest; the new officers of the manor simply superseded the ancient Saxon officials while exercising the same rights and duties in most cases.

22. **History.**—At the time of the conquest of England by William, most of the land outside of the cities and towns was divided into manors held by the crown and tenants in capite, for many of the feudal principles had been introduced prior to the conquest by William. These manors held by the

Danish earls contained from three to ten thousand acres. They were first divided into three great fields, then into acre strips, four rods wide and forty rods long. For convenience in plowing, these strips were made forty rods long, this being the distance the oxen could plow without stopping to rest. It was called a furrow-long, or furlong. Why the strips were four rods wide does not appear. Between each pair of acre strips was a little space of uncultivated land which was allowed to grow up in weeds, brush and grass. These strips were to be seen in England for a thousand years or more.

The acre strips were portioned out to the villeins, a term designating persons who were not freemen. From this word is derived our term villain, or person of bad repute. These tenant farmers bore the same relation to the lord of the manor as the Russian serfs held to the owner of the land down to the time of Nicholas. Each villein was apportioned thirty acres to farm, ten acre strips in each of the three large fields, and these strips were not adjoining. In cultivating the land the villeins worked together. Each was obliged to keep two oxen for a team, which he could not sell without the consent of the lord of the manor. Each villein formed an agreement with three others so as to have a full team with which to plow the land; in the plowing each had his particular work to do, and the man holding the plow was obliged to plow his neighbor's land as well as he did his own.

When William the Conqueror ascended the English throne, over one thousand of these manors

became his by right of conquest. In addition to these crown estates, the estates of the nobles who opposed him were confiscated and went to the king as lord paramount. These estates were granted by William to his military followers. His chief soldiers took the estates as they were left by their predecessors, so that in many cases the actual occupants of the land were not disturbed in their possession, but there was simply a change of masters. The lands of the church were left undisturbed, and also the manors of some of the nobles who had not opposed William.

23. **Tenure.**—The land in the manors, under the feudal system, was held by military tenure, there being no taxes levied by the king, except directly on the tenants in capite, who were obliged to make certain returns to the king in the way of military service and equipment, as, to serve the king at least forty days in the year, and when so doing to furnish all arms, equipment, horses and provisions; this was his return, or rent, for the use of the land. The amount of service and quantity of supplies to be furnished were fixed in proportion to the amount of land held by the various tenants in capite. A relation similar to that established between the king and the tenants in capite was established between the lords of the manors and their tenants. The tenant could not sell the land, but he could grant it to another upon the same terms he had received it; this was called sub-infeudation; and those not landowners had to attach themselves to some landowner for the purpose of obtaining his protection.

CHAPTER V.

SOURCES OF TITLE IN THIS COUNTRY.

24. **American titles based on right of discovery and possession.**—In 1496 the King of England granted to John Cabot, a Venetian sailor residing in England, a commission under the royal seal to discover countries then unknown to Christian people and to take possession of them in the name of the crown of England.

Possession was then deemed necessary to a perfect title and therefore these early explorers would land on the coast, throw out to the breeze the flag of their sovereign and formally announce that they took possession of the territory for their sovereign.

Two years after receiving his commission, Cabot landed at the 56th degree of north latitude and sailed south along the coast to the 38th degree, formally taking possession, in the name of the King of England, of the country lying north of the Gulf of Mexico and running from the Atlantic to the Pacific. But it turned out that the French and Spanish monarchs had prior claims to part of the territory, and some of the lands claimed by England by right of Cabot's discovery and taking possession had to be relinquished to prior discoverers. It was a recognized rule that the discovery of the mouth of a river entitled the discoverer to all the territory drained by

that river, so that the entire Mississippi river basin was given up by England to previous discoverers.

25. **Effect of colonial charters.**—Most of the English colonies which preceded our state governments were given the charter of the sovereign which granted not only the title to the soil but the powers of government. The nature and extent of these grants both of property and powers were regulated by the common law of England, which the English homeseekers claimed as their birthright and brought with them.

The immediate effect of the charter was to grant in most cases to the colonial government the rights of the crown to be held for the colony as the crown held them for the realm of England, and also the ordinary right of property in the soil to be held on the liberal tenure of free and common socage, which was a holding in absolute ownership free of any peculiar obligations whatever as private rights and real estate are held at common law.[29]

26. **Title to land under colonial charters.**—The charters of the colonies differed materially from each other, and land tenures differed correspondingly. Some colonies possessed charter governments, others provincial and others proprietary, as Pennsylvania and Maryland. Yet the colonists claimed as a rule: 1. That they enjoyed the rights and privileges of British born subjects, and that the common law of England was in force in each colony. 2. In all the colonies the land within their limits was held under the original grants and charters in free and common

[29] Commonwealth v. Roxbury, 9 Gray 451, 481 (Mass.).

socage, and not under the ancient feudal tenures.[30] They all agreed that the feudal system did not exist in this country, and that the land was held free from all manner of feudal service.

No oath of fealty seems to have been required in this country, but the oath of allegiance has been required in many states where the laws formerly prohibited a foreigner from holding lands. This oath of allegiance takes the place of the feudal oath of fealty. No other services have ever been required, and free socage is an independent holding, if not an absolute holding.

27. **American law evolved from the English law.**—Our American law of real property is that of England, which our forefathers brought to this country in colonial times, and which became so firmly rooted that but few changes, and these chiefly statutory, have been made.[31] A few principles of the English law, such as entails, a system under which land must be kept in the family, which we discuss under Chapter XII of this article, and the principles of primogeniture, by which all land descended to the eldest son, being contrary to our system of government, soon died out, or were legislated away.

28. **Acquisition by the United States of English titles.**—At the time the independence of the United States was acknowledged by Great Britain, she possessed all that portion of our present territory lying north of the Gulf of Mexico, and east of the

[30] Title in common socage differed from the other feudal tenures in that it was free from many of the feudal burdens and services, the principal burden attaching to it being the oath of fealty to the lord paramount.

[31] See Van Rensselaer v. Hays, 19 N. Y. 68, LEADING ILLUSTRATIVE CASES.

Mississippi River, except a portion of Louisiana and Florida. By the express terms of the treaty acknowledging the independence of the colonies the United States succeeded to all the right of the British crown within these boundaries.

29. **Cession of lands by the colonies to the general government.**—At the close of the war for independence, the colonies were burdened with a heavy debt, and it was suggested by the several states that the land belonging to them outside the limits of their several jurisdictions should be turned over to the general government for the purpose of paying their share of the public debt, and for the further purpose of having the territory divided into states to be later admitted into the Union. At this time all the land east of the Mississippi was claimed by one or the other of the original states. Virginia claimed all the Northwest Territory, but her title was disputed by Connecticut and Massachusetts. These conflicting claims were all settled and the land ceded to the United States Government, except a portion of what is now the northern part of Ohio, given to Connecticut in satisfaction of her claim. This reservation was settled by people from Connecticut under grants from that state, and is still known as the Connecticut Western Reserve.

When the general government acquired this land from the states, it at first sold and transferred large tracts to private individuals and corporations, but soon afterwards adopted the public land system, which has since been in force and which is discussed in Chapter LVIII of this article.

30. **Subsequent purchases and acquisitions by the United States.**—In 1803, the United States purchased from France her holdings in North America, called Louisiana, including the present territory of Louisiana, Arkansas, Missouri, Kansas, Minnesota, Nebraska, North and South Dakota, Iowa, Montana, Idaho, Colorado, and Oklahoma and Indian Territories, this purchase consisting of about half as many square miles as the original territory of the United States.

In 1819, the government acquired from Spain the territory of Florida.

In 1845, the Republic of Texas was annexed. This included all the territory comprised within the boundaries of New Mexico and Texas.

In 1848, the government acquired from Mexico all that territory west of the Rocky Mountains and south of the north boundary line of California, extending from the Pacific Ocean to the Rocky Mountains.

In 1867, the government purchased from Russia the territory of Alaska.

The territory included within the states of Washington and Oregon was acquired by the United States by right of discovery and settlement.

In 1896, the United States acquired by annexation the Hawaiian Islands; and as a result of the Spanish War, and of purchase, it has acquired Porto Rico and the Philippine Islands.[32]

31. **Rights of the Indians to the land.**—At the time of the discovery of America by Columbus, in

[32] See maps showing the purchases in McMaster's History of United States, vol. II.

1492, the territory of the various states was sparsely inhabited by various tribes of Indians, who were differently organized in the various portions of the country. The organization of the Six Nations in New York was probably the most complete of any and comprised six separate and distinct tribes of Indians. These Indians had communal lands adjoining their villages, very similar to the communal holdings of the early Germans in their semi-barbarous state.

Aside from these communal lands the vast forests were held in common as hunting grounds by the tribes, the Indians not having the idea of separate ownership of land except where their wigwams were situated. By reason of this prior possession the Indians claimed to have the sovereign title to the land by the laws of nature.

But when the European nations began to discover and make settlements in the new world they paid little attention to the claims of the Indians, and assumed that the soil belonged to the sovereign of the country in whose name it was discovered, and that the tribes occupying it had no sovereign title, but a mere right to use it, which was similar, if not identical, to the feudal doctrine that title belonged to the sovereign and the inhabitants were entitled to the use only of the land.

The question of the Indian's claim to sovereign title to land came before the Supreme Court of the United States and it was decided by Chief Justice Marshall in accordance with the prevailing rule among European nations, as follows:

1. The title to land depends upon the laws of the country in which the land is situated.

2. The several European nations claiming possession upon this continent agreed that the nation whose subjects first discovered any portion of this continent should have title to that portion of the land.

3. The relations to exist between the discoverers and the aboriginal inhabitants were to be regulated by the parties themselves.

4. The aboriginal inhabitants were admitted to have the right of possession of the soil, coupled with the right to use it; but the right to alienate it was incompatible with the title of the discoverer.

5. The possession and right to use in the original inhabitants did not prevent the nations who held the ultimate title by right of discovery from granting the lands, and the grantee took a good title subject to the Indians' right to use it.

6. The United States, upon gaining independence, succeeded to all the rights of Great Britain, France and Spain within the limits of the territory acquired.

7. The United States has the exclusive right to acquire the title of the Indians. In other words, no grants made by the Indians to a private individual were good. The Indians could not sell their right to occupy and use the land to a private individual.[33]

32. **Indian titles.**—The English possessions in America were not claimed by right of conquest but

[33] Johnson v. McIntosh, 8 Wheat. 543 (U. S.), LEADING ILLUSTRATIVE CASES. In this case a Choctaw Indian claimed land under the grants of certain Indian chiefs who were the original occupants of the territory. The court held as above stated that the Indians could not convey a good title to a private individual as the sovereignty was in the United States Government.

by the right of discovery. For according to the principles of international law as then understood by the civilized powers of Europe, the Indian tribes in the new world were regarded as mere temporary occupants of the soil, and the absolute rights of property and dominion were held to belong to the European nation by which any particular portion of the country was first discovered. Whatever forbearance may have been sometimes practiced towards the unfortunate aborigines, either from humanity or policy, yet the territory they occupied was disposed of by the governments of Europe at their pleasure, as if it had been found without inhabitants. The discoveries made by persons acting under the authority of the government were for the benefit of the nation; and the crown, according to the principles of the British Constitution, was the proper organ to dispose of the public domains, and upon these principles rest the various charters and grants of territory made on this continent. It is a principle of universal law that an uninhabited country, if discovered by a number of individuals who owe no allegiance to any government, becomes the property of the discoverers. If the discovery, however, is made and possession taken under the authority of an existing government which is acknowledged by the emigrants, it is likewise equally well settled that the discovery is made for the benefit of the whole nation; and the vacant soil is to be disposed of by that branch of the government which has the constitutional power to dispose of the national dominions; by that branch in which all territory is vested by law. According to

the theory of the British Constitution all vacant lands are vested in the crown as representing the nation, and the exclusive power to grant them is admitted to reside in the crown, as a branch of the royal prerogative. This principle was as fully recognized in America as in the island of Great Britain. When the Revolution took place, the people of each state became themselves sovereign; and in that character held the absolute right to all lands the title to which had not been acquired by individuals.[34]

33. **Relations of the United States government with the Indian tribes.**—The relations of the general government with the various Indian tribes have been somewhat anomalous. While the Indian is regarded as having no paramount title to the land, yet the tribes are considered so far independent as to enable them to make treaties ceding their lands to the general government, and that is about all the independence our government has recognized as belonging to the Indian tribes.

These treaties are made by persons appointed by the President with the consent and advice of the Senate, and are called Indian Agents. The government has thus made treaties with the Indians for all of the Northwest Territory. In many instances the Indians have reserved a reservation and ceded the balance of the soil. In many cases, the reservations were in favor of the entire tribe, but in some cases were in favor of an individual. They are described by their natural boundaries, as water courses, trees, rocks and the like. In surveying the government

[34] Martin v. Waddell, 16 Pet. 367, 409 (U. S.).

land the surveyors regard these reservations as impassable territory, and run the line up to them and then around. It is these territories that the government buys from the Indians from time to time and opens up for settlement.

In tracing title to land in an Indian reservation, the completed title starts with the treaty made with the general government by the Indians, as the sanction of the two as to the land in the reservation makes a perfect title.

34. **How far Indian titles are sustained.**—It has been the general policy of this government to recognize the claims of the Indians on lands actually occupied by them. So a grantee from the government takes subject to the Indian title and at the risk of subsequent confirmation of his title by the government, as Indian titles are generally sustained when based on occupation and possession. The reason is that before the discovery of America the Indians were a distinct people divided into separate nations independent of each other and of the rest of the world, having institutions of their own and governing themselves by their own laws. The great maritime powers of Europe discovered and visited different parts of this continent at nearly the same time; and they established, as we have seen, the principle that discovery gave title to the government by whose steps or by whose authority it was made against all other European governments, which title might be consummated by possession. This principle, however, gave no rights over the Indian nations which had at that time title to the land by possession

and the title granted by a European government through their charters must be subordinate to the Indian right of possession.[35]

35. **Pre-emption under federal statutes.**—Many of our titles in the western states depended on the pre-emption statutes which have lately been repealed by Congress. A pre-emption was an offer made by statute by the government to an individual settled upon public land, giving him a prior right to buy the land from the government. The right was not a title nor an interest in the land, but it was merely a right of occupancy with the privilege of purchasing in preference to anyone else when the government should elect to sell. The amount of land that could be acquired by pre-emption was definitely limited by statute and the persons who might acquire pre-emption rights were also limited.

[35] Johnson v. McIntosh, 8 Wheat. 543 (U. S.), LEADING ILLUSTRATIVE CASES.

CHAPTER VI.

TENURES.

36. **Tenures defined.**—The word tenure covered not only the situation of the occupier of the land as owner but also included the terms on which he held his lands. The word is of little importance today, as lands are all held in absolute ownership or by what was known as the tenure of free and common socage. Tenure in England was divided according to the nature of the services required of the tenant into free or base, and, respecting its quantity in terms of performance, it was divided into certain or uncertain.

37. **The Saxon system of tenures.**—It is very uncertain whether the feudal system or any part of it was imposed on the Saxons before the conquest by William the Conqueror, but it is certain that in general the Saxon system of land tenures before the conquest was very nearly what it is today. Most of the land was allodial; that is, it was held by an absolute ownership in the holder of the fee simple without any of the duties of service to an overlord which characterized the feudal system of tenures. These lands could be granted by deed of sale or by gift or could be devised by will, and were liable for the debts of the owner on his death, and if he died intestate they went to his heirs.

38. **The Domesday Book.**—The Domesday survey was an assessment or inventory of all the real property made by William the Conqueror twenty years after the battle of Hastings, in order to ascertain the holdings and value of the various manors. In the first place commissioners were appointed by the king to go through the country and visit the various manors, and ascertain their size, the owner thereof, and from whom he derived title; also the number of acres of pasture land, woodland, and waste land, and the fisheries. The assessors also ascertained the number of freemen, cottagers and villeins on the manors, and in effect made a general assessment of all the property in England. From this data, called the Domesday Book, the king was able to fix the returns he should receive from the holders of the manors. This Domesday Book was the basis for the feudal land tenures, as it represented the original holdings under William the Conqueror.

39. **All lands held of king.**—In 1085, one year before the Domesday survey, all of the great landholders met the king at Salisbury Plains and took oath of fealty or homage, which was an acknowledgment that they held their lands from William as lord paramount. And from that day to this it is the theory of the English law that all title to land is derived from the crown, and that there is no valid title unless the grant can be traced back to the crown.

40. **Four principal tenures.**—Originally there were four principal forms of tenure, gavelkind, free and common socage, which is the usual form of tenure today, copyhold, and ancient demesne, which is a

kind of copyhold tenure concerning land held in manors.

Gavelkind was a very ancient tenure which prevailed in the county of Kent and was apparently preserved by the inhabitants against the feudal system at the time of the Norman Conquest. Some of its features are the descent of the estate in case of intestacy to all the sons in equal shares and so to brothers and other collateral relatives on failure of direct heirs. Every tenant was until recently able to dispose of his estate at the age of fifteen years and this tenure is furthermore free of the liability of escheat. It will be noticed that the American system of descent to all children equally rather than to the eldest son is thus a direct inheritance from the early Saxons before the Norman Conquest.

41. **Tenure in chivalry.**—The usual tenure was that of knight service or tenancy in chivalry and was esteemed the most honorable because of the nature of the service to be rendered, which consisted in attending the lord in war for forty days in every year. But its incidents made it the most oppressive. Among these incidents were aids, relief, wardship, marriage and fines, all of which have been defined heretofore.[36]

42. **Grand sergeanty.**—Grand sergeanty existed where a man held his land from the king by service to be performed personally to the king, and these services were expressly retained when the statute of Charles II was passed,[37] abolishing feudal tenures.

[36] See § 18.
[37] 12 Charles II, c. 24.

43. **Villeinage and copyhold tenures.**—There was a class of persons attached to every manor who had no rights under any one of these feudal tenures, who were substantially slaves, but as they were permitted to live in certain parts of the manor on certain conditions there grew up a sort of tenure of lands which was called villeinage. The service to be performed was at first uncertain, depending on the whim of the lord, but later this service became fixed and certain.

It appears that at one time more than half the land in England was held in villeinage. This system died out through no act of legislation, but as the result of public sentiment, until at the time when tenures were abolished in the reign of Charles II there were but two villeinages remaining in England. This system of tenure was the forerunner of the modern system of copyholds and copyhold land, which, however, never has had a place in the United States. A copyhold estate was originally an estate held at the will of the lord under certain customs evidenced by a copy of entries on the roll of the baronial courts. It is a villeinage tenure deprived of its servile incidents.

44. **Frankalmoign.**—Tenure in frankalmoign is the ecclesiastical tenure by which the monasteries and religious houses were formerly held, which still subsists, in a modified form, in England at the present time. It was an old Saxon tenure which survived after the conquest by William the Conqueror. The only service rendered the lord was praying for the souls of the donor and his heirs. The character

of this tenure was somewhat altered at the time of the Reformation.

45. **Tenure in England today.**—Tenure by free and common socage is very ancient and was, in fact, the old Saxon tenure. Its great superiority was its freedom from the burdens of wardship and marriage and other exactions imposed on the tenants of estates in fee held by other tenures. All the lands in England were finally held in free and common socage under an Act of Parliament passed on the restoration of King Charles II,[38] taking away all the ancient feudal privileges. This statute is spoken of by Blackstone in his Commentaries as more important to the civil property of the kingdom than even the Magna Charta itself.

46. **Tenure in this country.**—The grant of lands by the crown to the early colonies prescribed in some cases, as the tenure by which they were to be held of the crown, "free and common socage, and not in capite by knight service." Some of these lands were granted, however, subject to a reservation as rent or certain payments of the products of the soil. But it has been held throughout that the states did not succeed to any such right and that the state is not now the overlord of any of this land in the feudal sense. It has been claimed that, theoretically at least, there is a tenure in this country whereby every man holds his land of the state as before the revolution and escheat is cited as a perquisite of a feudal character. But it is now well settled that any such tenure has become obsolete and that the only duties

[38] 12 Charles II, c. 24.

now owed by the landowners to the government are the duties of allegiance and of escheat. Escheat, which was an incident of the feudal law, remains as an incident of sovereignty and not of tenure, and the right of eminent domain exists not by reason of tenure but as an incident of the police power of the state. The oath of allegiance to the state is now entirely political and has nothing to do with the tenure of the land. Lands in this country are universally allodial, that is to say, they are not held of the crown or of the government, but the absolute ownership is in individuals without recognizing any superiors to whom any duty is due on account of the lands.

CHAPTER VII.

SEISIN AND LIVERY OF SEISIN.

47. **Seisin defined.**—Seisin is a technical word and signifies that process by which under the feudal law the tenant was admitted into the feud and performed the rights of fealty demanded by the feudal system. It was used in contradistinction to that precarious kind of possession by which tenants in villeinage held their lands which was considered to be in reality the possession of their lords in whom the freehold continued. Seisin now signifies possession, but it is not every possession which constitutes a seisin. It is only a possession coupled with an actual claim of a freehold or possession under such circumstances that the law presumes such a claim, which amounts to a seisin. The term seisin implies a freehold estate for life or in fee. It is more than the mere possession; it is possession with a legal right to the estate in land.[39]

48. **Attributes of seisin.**—There may be a seisin in law or a seisin in fact. A seisin in law occurs where some person has not possession but has the immediate right to possession, as on the death of the owner before the heir or devisee has taken possession. Seisin in fact, on the other hand, implies an actual possession under lawful title. According

[39] See Hargrave's Note on Seisin, 217, LEADING ILLUSTRATIVE CASES.

to the theory of the common law there was and could be but one seisin of any one parcel of land.

Another theory of the common law was that seisin could never be in abeyance or suspense but must always be in someone on account of the feudal notion that the freehold should always be occupied, that there might be some one always ready to perform the feudal services.[40]

49. **The effect of seisin on devise of land.**—Livery of seisin was such an integral part of conveyance of land at common law that this is one reason why lands could not be left by will until long after they became capable of being transferred by deed. It was considered that as the owner was dead there was no one to make the necessary livery of seisin.

50. **Seisin in case of remainders.**—The doctrine of seisin is more complicated in cases of reversions and remainders. A reversion occurs where the owner grants an estate less than a fee as a life estate, and leaves the interest after the termination of the smaller estate in himself. A remainder occurs where the owner grants his land to A for life, and on his death to B. B's interest is here a remainder. A remainder is any estate granted to one not the owner after the termination of an estate less than fee. Of course, in the case of an estate for years seisin remains in the landlord and there is no difficulty. Furthermore, in the case of a vested remainder, i. e., one not dependent on any condition, livery of seisin to the lessee operates as a livery of

[40] Browning, Davis Decisions, p. 7.

seisin to the remainderman and the lessee remains in place of the remainderman to accept livery for him. In all cases livery of seisin is made to the one who takes the first estate by the right of possession. The result is that the remainderman can never make livery of seisin.

If the first estate is a freehold, as one for life, the seisin as well as the possession remains in him and passes to the remainderman immediately upon the determination of his estate, which is commonly known as the particular estate. The result is that the only way in which a remainderman can transfer his interest is by deed of grant without livery, unless the particular estate is in a tenant for years and he agrees that the remainderman may enter upon the property for the purpose of giving livery of seisin.

51. **Disseisin.**—Another doctrine of the common law which resulted from the early practice of livery of seisin was that the one who lost his seisin could not convey any title whatever. Where one is wrongfully deprived of his seisin he is called technically disseised; the one who did the act being a disseisor, and the one who loses the seisin being a disseisee. The old notion that the deed of a disseisee was void does not prevail today, but now his deed will pass whatever rights he had.

52. **Seisin a fundamental idea of our land law.**—The feudal idea of seisin is so interwoven in the whole theory of the law of real estate and especially of its conveyance that a somewhat intimate knowledge of the early law upon it is necessary.

The modern conveyancer is so tied down to the

question of a record title that he may overlook the fact that it is still possible to have titles founded upon seisin or possession alone, and that such titles are occasionally registered in our land courts. The Massachusetts Land Court said in a recent case, "A man who is in actual possession of land under a claim of ownership where there is no one who can lawfully dispute his right to so hold it, has every essential of title under our law." It is the right to immediate possession, not the ultimate determination of true ownership, with which the common law is concerned. The only proper question for the conveyancer is or should be: What is there of record to interfere successfully with the person now in possession and claiming title?[41]

53. **Seisin vital today.**—The old Anglo-Saxon theory or rather fact of seisin was a fundamental principle of the common law and is none the less a living part of the real estate law of today notwithstanding in the daily practice of conveyances it has become so obscured by the intricacies and ramifications of our record titles. It is the right to immediate ownership with which the common law is concerned. He is the true owner who has the right to possess actual enjoyment and control of land and the recognition of peaceable enjoyment and control are the points that stand in the forefront of the common law when we take it as presented by its own history and its native authorities.

54. **The ceremony of livery of seisin.**—Three times a year the king sat in his court, composed of

[41] See Leake, Digest of Land Law, pp. 46-48, LEADING ILLUSTRATIVE CASES.

the great barons of the household and the bishops of the church, and the tenants of the land were obliged to appear and kneel before the king and take the oath of allegiance. Having taken the oath, the king threw upon the tenant the robe of office, and this was called his investiture; that is, the tenant was invested, or, so to speak, clothed with the land. This ceremony of taking the oath of fealty and investiture, as between the king and tenants in capite, was again performed between the chief tenants and their subtenants. After the ceremony of allegiance or fealty the tenant was actually put in possession of the land by livery (or delivery) of seisin, when the lord and tenant went upon the premises, and there in the presence of witnesses the lord delivered to the tenant a tuft of grass or twig from the land, and declared the tenant to be in possession of all the land then granted to him; this ceremony taking the place of, and being considered of more importance than the execution of a deed.[42]

The common law conveyancer usually had to deal with persons who could not read or write, and the use of written instruments was therefore inconvenient and well nigh impossible. Alienation was effected, as among all uncivilized people, through the aid of symbols; and the transfer by means of symbols, as described above, was called livery of seisin. The witnesses must be other tenants of the same lord, and therefore if the lands granted were all in

[42] See Freeman's Norman Conquest, chap. XVII; Stubbs' Constitutional History, § 95; Digby's History of Real Property, chap. 1, 2; 2 Blackstone, Commentaries, chap. 4; Williams, Real Property (6th ed.), chap. 1; Littleton, § 59, LEADING ILLUSTRATIVE CASES.

one manor, although consisting of different lots, entry upon one was sufficient as to all. But if they were in different manors the entry must be made upon each and it must be witnessed by the tenants of each manor. This was the origin of an old rule of law that if lands are situated in different counties, there must be an entry upon those in each county to pass an actual seisin. There was no written deed necessary to complete a title, although notations were often made in the lord's records of the transaction. The same result was sometimes accomplished in other ways, as where the lord gave the tenant a staff, a ring, or a sword, or put a robe upon him as the sign of his investiture as his tenant.

55. **Livery of seisin and feoffment.**—The transfer of title and passing by the livery of seisin constituted a feoffment, which is a term still used in conveyancing. A feoffment with livery of seisin is the most ancient form of conveyance known to the common law. Feoffment means a gift or other transfer with livery of seisin. The person who made the transfer was called the feoffor, and the person who received it, the feoffee.

56. **Kinds of livery of seisin.**—Livery of seisin was said to be of two kinds, livery in deed and livery in law. Livery in deed was the ceremony performed on the premises by which the tenant formally took possession. The livery in law was not made on the land but in sight of it only, the feoffor saying to the feoffee, "I give you yonder land. Enter and take possession." And the feoffment became good if the feoffee entered during the life of the feoffor. But if

either died before entry the livery was void. This livery was good although the land lay in another county, but it must always be made between the parties themselves and could not be turned over to an attorney, as might livery in deed. The word "give" was the apt and technical term to be used in a feoffment.[48]

57. **Livery of seisin in the United States.**—There is some authority for believing that livery of seisin was at one time practiced in the United States. It seems to have been used in the seventeenth century in Massachusetts and such a conveyance was valid in Pennsylvania until the Act of 1772 requiring a deed. With these exceptions in the United States livery of seisin has never been essential for the creation of a freehold estate, nor is an entry necessary to perfect title.

[48] Co. Lit., § 59, pp. 48a-60, LEADING ILLUSTRATIVE CASES.

CHAPTER VIII.

THE GROWTH OF INDIVIDUAL RIGHTS IN PROPERTY AND OF ALIENATION.

58. **The growth of individual rights in land.**—The theory of individual rights of ownership of lands and the products thereof has arisen gradually as civilization has advanced. While our progenitors were in a nomadic state and had no settled abode there was no individual interest in land. But as they gradually settled, the title to the land which they took up was at first held in common, then gradually grants were made from this land to separate owners. This situation is shown very clearly in parts of New England, where the towns grew out of meetings of the proprietors of common lands, and the early titles rest in some cases on votes of these proprietors setting apart lands to individual proprietors in exchange for their interest in the whole.

So in the early history of the Saxon people, land was for the most part owned by the people in common. The only property that was not subdivided among the people generally to be held in common, was that actually occupied by the residence of the family. Thus, if a person built a house the land occupied by the house was regarded as his property, and was not subject to be divided. But the fields outlying the villages were held in common and divided

from time to time among the people, as was done in Russia until recently. These lands were then cultivated by the person to whom they were given. This was the system prevailing in England some time prior to the Norman Conquest.

59. **Who may be freeholders—Persons—Aliens.**—The early limitations on owning a freehold interest in lands have been in most part done away with, until today in this country there is, practically speaking, no limitation. Prohibition against aliens holding real estate has generally been done away with by statute. A prominent exception to this rule is found in the state of California, which in 1913 barred the yellow races, under certain conditions, from acquiring real estate, either by deed or lease. Furthermore, there are states like Illinois, where an alien may hold land, but only for a limited period of time.

60. **Who may be freeholders—Corporations—Mortmain Acts.**—Under the early common law any corporation could hold real estate as an individual, but as corporations became more powerful and as the monasteries became more wealthy they acquired more and more lands, estates frequently passing to them by devise in exchange for the saying of masses or other religious rites for the repose of the soul of the landowner. In this way the religious corporations acquired so much property that in the time of Henry VIII one-third of all the lands in England was in their hands. This was a condition which could not endure and Henry VIII during his reign confiscated many of these lands. Parliament also

passed statutes at various times restricting the amount of land which could be held by a corporation. These are called the statutes of *mortmain,* the word mortmain meaning dead hand, and the statutes were made to prevent the holding of land by ecclesiastical corporations which could not perform the feudal services. Today even foreign corporations can hold land unless forbidden by the laws of the state where the land lies. Corporations are frequently forbidden by their charters to hold more than a certain amount of real estate, the general rule being that no corporation, organized either for pecuniary profit or otherwise, can acquire more landed property than that which may be necessary for the proper conduct of its corporate enterprise.

61. **Subinfeudation.**—Under the feudal system, it being impossible for tenants to sell their lands directly, they early resorted to a process of making transfers in the form of leases which corresponded very closely to the subleases of the land by the tenants to other persons. This practice caused the landlord some hardship, as it made it very difficult for him to collect the feudal services. In the Magna Charta the barons inserted a clause to the effect that no subinfeudation should be allowed unless the tenant retained enough property in his hands to secure the feudal services. This clause in the Magna Charta is said to be the first recognition in the English law of the right of alienation of land.

62. **Statute of Quia Emptores.**—The statute of Quia Emptores, named on account of the words with which it begins, was passed in the reign of Edward

I[44] and invested the freemen with the power to sell their lands which they held as tenants under the feudal system on condition that the feoffee should hold by the same service as the original tenant. The statute excepted from its provisions tenancy "in capite" or by knight service. Such tenants were given the right to alienate at a later period. This statute was the first attack on the close holding of lands under the feudal system and is the foundation of all our modern law of private ownership in real estate.

The statute of Quia Emptores abolished subinfeudation, declaring "that from henceforth it shall be lawful to every freeman to sell of his own pleasure his lands and tenements, or part of them, so that the feoffee shall hold the same lands or tenements of the chief lord of the same fee, by such service and customs as his feoffor held before."

63. **Right to devise land by will.**—The right to give lands by will was not in existence until long after the right of passing by deed or feoffment. The citizens of a few towns which had special privileges, like the City of London, had the right of devising by will on account of a special custom, but lands were not generally made devisable by will until the reign of Henry VIII.[45] At that time a statute was enacted giving the right to owners of land to devise the same. This is known as the Statute of Wills.

[44] 18 Edward I, c. 1. As to the growth of the right of alienation, see further § 93.

[45] 32 Henry VIII, c. 1.

CHAPTER IX.

ESTATES.

64. **Estates defined.**—The property or present interest held in real estate is known as an *"estate."* The word "estate" is derived from the Latin word *status,* meaning condition, showing the condition or circumstance in which the owner stands concerning his property.

65. **Distinction between freehold estates and others.**—Estates are divided into freehold and those less than freehold. Freehold estates are estates which can be held only by livery of seisin and include only lands which may be held by a freeman. An accepted definition of the term freehold is "an estate of inheritance or for life in real property, whether it be a corporeal or incorporeal hereditament." Estates less than freehold may be estates for years, which are called chattel interests. Originally a freeholder as such had rights and privileges beyond the mere enjoyment of the land. He was a member of the county court and of the lord's court; was entitled to be summoned on juries and to vote at certain elections.

The distinction between the estates of freehold and estates less than freehold was in these early times very marked. In a feudal government resting upon land tenure the holder of land was a person of some

importance. Today the distinction is comparatively unimportant.

66. **Estates less than freehold.**—There are three kinds of estates less than freehold: estates for years, estates at will and estates by sufferance. An estate for years is defined by Blackstone as being a contract for the possession of lands or tenements for some determinate period, where the lessee enters upon the premises. An estate for years may be for any period, even less than a year, and may be created by any form of words. The estate was not created by livery of seisin and the lessee therefore does not have seisin. The estate may be created by devise as well as by contract.

Estates at will at common law are estates where possession is given at the will of the landlord and, unless otherwise expressly agreed upon, are now considered to be estates from year to year whenever rent is payable at definite periods.

A copyhold estate was at common law merely an estate at will, but through the indulgence of the landlords whenever a notation of the estate was made on the court rolls according to the custom of the locality, the same was evidenced by a copy of the roll or record and the term copyhold thereby arose.

A tenancy by sufferance arises when a person obtains possession of land lawfully and continues to occupy without any title whatever, and such tenancy may be terminated at any time at the election of the landlord.

67. **A tenant to the praecipe.**—A *praecipe* was an

ancient process to recover a freehold and a defense to it could only be made by one having an equal estate; the term therefore arose, "tenant to the praecipe," meaning one who was bound under the feudal system to set up his title in defense of any action made by an adverse claimant. It was the duty of the tenant having the freehold to do this under the feudal system to protect his subtenants who might have no protection against an adverse claimant by reason of the inferior nature of their tenancy.

68. **Freehold cannot be in abeyance.**—It was a fundamental principle of the feudal system that there must always be some tenant in possession to serve the lord, and thus arose the doctrine which prevails today, that the freehold cannot be in abeyance. For example, no estate in freehold can be created to begin in the future where there is not some immediate estate of freehold in the meantime. A conveyance by deed, for instance, to a person unborn or unascertained would be void. Yet there are cases which we shall take up later in modern conveyancing where the fee may remain in expectancy, there being no person in esse in whom it can vest, though the law considers it as always potentially existing and ready to vest whenever the proper person appears. Of this character are certain conveyances to classes of persons the members of which may be at the present time unascertained.

It also has been said that under the ancient law the fee might be in abeyance when a clergyman died and the freehold of his parsonage land is in abeyance

until a successor is named. It is answered, however, that this is an act of the law and the freehold though suspended during a vacancy revives in favor of the successor. The proposition is in general terms true that no person can make a grant in such terms as to keep the fee in abeyance.

69. **Freehold must be continuous.**—A corollary to the rule that the freehold must not be in abeyance, is that it must be continuous, that is, uninterrupted; and upon one ceasing to have seisin, some other, either in fact, by deed, or through operation of law, must immediately take, and such seisin will vest in such taker. The law does not allow the creation of an estate in A in land on every Tuesday, and in B on every Wednesday, etc., as in this way there would be no person proper to defend suits brought against the owner of the land. The estates in freehold must follow each other in regular succession without either lap or gap—each estate must begin at the exact instant that its predecessor terminates.

70. **Frankmarriage.**—The estate of frankmarriage was another conditional estate where a person granted lands on the marriage of another on the condition that they should descend to the issue, if any, of such marriage. If the grantee had issue, the condition was regarded as having been satisfied and the grantees thereupon had an absolute estate; otherwise there was a reversion in the grantor.

71. **Equitable estates have same incidents as legal estates.**—The doctrine of courts of equity is that equitable estates are considered, to all intents and purposes, like legal estates. In construing the limi-

tations of a trust, courts of equity adopt the rules of law applicable to legal estates. The cestui que trust (beneficiary) takes the same interest in duration as in a legal estate. Trust estates are subject to the same incidents, properties, and consequences as, under like circumstances, belong to similar estates at law. They are alienable, devisable, and descendible in the same manner. Though an equitable estate is incapable of livery of seisin, yet conveyances which operate by the Statute of Uses (treated under Chapter XVII of this article) will transfer the equitable fee. Though the peculiar process of fines and recoveries is inappropriate to them, entails of equitable estates might, nevertheless, be destroyed by this process. The rules regulating the descent of legal estates on the death of the owner govern the transmission of equitable estates.

The cases where the analogy between equitable and legal estates fails, are not numerous, and there is scarcely a rule of law or equity of more ancient origin, or which admits of fewer exceptions, than the rule that equity follows the law.

A notable exception to the identity of equitable and legal estates formerly existed, in that a widow was not dowable in a trust estate. The grounds on which this exception rested are explained by Lord Redesdale, in D'Arcy v. Blake, 2 Sch. & Lef. 387. This anomaly has been generally removed by statute and a widow is now entitled to dower in the equitable estate of her husband, the same as in his legal estates.

With regard to curtesy, an equitable estate of

inheritance in the wife always conferred on the husband an estate as tenant by the curtesy, if the requisites of such a title in a legal estate existed. Actual possession of the estate, or the receipt of the rents, issues, and profits by the wife, or possession by her trustee for her benefit, is considered as such right of seisin of the equitable estate as is equivalent to legal seisin.[46]

72. **Reservations.**—If the grantor desires to take something out of the granted premises, to create a new estate, the proper term to use is "reserved." Thus, where A sells a parcel of land and desires to have a right of way over it which did not exist before, the proper term for him to use is "reserved." The use of this word in describing the estate desired to be created anew from the grant, creates an interest subordinate to the estate granted. The reservation creates a new estate, and since it does so the same terms should be used in creating it that would be adopted in creating a fee; that is, it should be *reserved* to the grantor, his *heirs,* and assigns. As a matter of fact these terms are used indiscriminately in grants, and the courts, therefore, examine the language of a deed to ascertain the real meaning intended by the language used.

[46] Cushing v. Blake, 30 N. J. Eq. 689.

CHAPTER X.

FEE SIMPLE.

73. **Meaning of an estate in fee simple.**—"An estate in fee simple (*feudum simplex*) is the greatest estate or interest which the law of England allows any person to possess in landed property. A tenant in fee simple is he that holds lands or tenements to him and his heirs; so that the estate is descendible, not merely to the heirs of his body, but to collateral relations, according to the rules of descent on death of the owner. An estate in fee simple is, of course, an estate of freehold, being a larger estate than one for life or in tail."[47] The meaning of an estate tail is discussed in Chapter XII of this article.

74. **Necessity of word "heirs" to pass a fee.**—At common law a grant of land to A was simply a grant for his life, and nothing further, it being an early established principle in feudal grants that they were not to be extended beyond the express terms of the gift, but were to be construed strictly, and such lands on the death of the life tenant reverted to the grantor.[48]

If a grant was to be of a greater estate than for life, it was necessary to show such intent that the descendants of the tenant were to succeed him, as by

[47] Williams, Real Property (6th ed.), p. 60; 3 Blackstone, Commentaries, p. 224; Littleton, §§ 1, 2, LEADING ILLUSTRATIVE CASES.

[48] Wright's Tenures, pp. 29, 152.

granting the land to "A and his heirs," or by other words showing such an intention. At first, in such a grant the heir took from the grantor since he was named in the original grant, and not from his ancestor. Hence it was said, "the ancestor and the heirs took equally as a succession of usufructuaries, each of whom during his life enjoyed the beneficial, but none of whom possessed, or could lawfully dispose of, the direct or absolute dominion of the property."

Another reason for the rule was that under the early feudal system a life estate was inalienable unless the overlord's consent could be obtained. A grant to A was, therefore, a grant to him as long as he could hold the land; that is, during his life and no longer, for at common law grants were always strictly construed and passed no greater estate than indicated by the terms of conveyance.

Under the feudal system the lords were quick to seize on any opportunity of obtaining a reversion from the tenant; and the fact that he could only grant to his heirs resulted in this, that if the grant was made to the sons and one died his share instead of going to his brothers reverted to the lord.

A fee may be implied by a grant to trustees where a fee is necessary for the purposes of the trust.[49]

75. **Same subject—Modern rule.**—The rule of construction followed in feudal times has been changed so that a grant of land is to be construed most strongly against the grantor, with the exception coming down from feudal times, that a grant to A,

[49] North v. Philbrook, 34 Me. 532.

simply, conveys but a life estate, and it is as necessary now, as it was in ancient times, to use the word heirs, if more than a life estate is to be granted. It is said that ignorance of this rule of law has served to defeat the intentions of many unlearned persons who try to write their own wills and deeds. The rule has been modified by statute in many of the states, the words of inheritance being dispensed with by a provision that every conveyance passes the entire estate of the grantor, unless a contrary intent appears or can be implied from the deed. "Generally speaking, no common person has the smallest idea of any difference between giving a horse and a quantity of land. Common sense alone would never teach a man the difference; but the distinction which is now clearly established is this: If the words of the testator denote only a description of the specific estate or land devised, in that case, if no words of limitation are added, the devisee has only an estate for life. But if the words denote the quantum of interest or property that the testator has in the lands devised, then the whole extent of this interest of his passes by the gift to the devisee. The question, therefore, is always a question of construction, upon the words and terms used by the testator."[50]

So in this country there are many early decisions which hold that a deed without the word "heirs" passes nothing more than a life estate. The rule, however, has always been less strict in regard to wills, where it is said that the fee will pass if such appears to be the plain intention of the testator.

[50] Per Lord Mansfield, in Hogan v. Jackson, 1 Cowp. 299 (Eng.).

As to deeds also the rule is now considerably relaxed and any language which indicates clearly the intention to pass the entire interest in land will be held sufficient to do so. In fact the presumption in many places is now the other way, that when a deed is given a fee is intended to be passed.[51]

76. **Unlimited right of alienation.**—The chief characteristic of the estate is the unfettered right of alienation on the part of the tenant holding in fee simple. This right was not acknowledged at first, but was of gradual growth, being assisted by the statute of Quia Emptores,[52] which permitted the selling of land, or a part thereof, provided the feoffee, or purchaser, should hold the lands by the same services and customs as his predecessor had held them, the object of the statute being to protect the claims upon the land of the chief lord.[53] The right of alienation of an estate, except an estate tail, which is treated under Chapter XII of this article, is now recognized as inherent, and it is impossible for any owner, by any means, to divest himself of the right.

77. **Incidents of fee—Restrictions on alienation.**—An estate in fee is also liable to the incidents of curtesy and dower, which we shall consider later.[54] At common law it might be forfeited for treason or felony, but this liability has been removed.[55] It is

[51] Smith v. Kimball, 153 Ill. 368, LEADING ILLUSTRATIVE CASES.

[52] 18 Edward I, c. 1.

[53] Williams, Real Property (6th ed.), p. 60; 3 Blackstone, Commentaries, p. 224. See further §§ 62 and 137.

[54] See further § 338 and § 344.

[55] See further § 677.

descendible to the heirs generally on the death of the owner.

Any condition in general restraint of its alienation is void.[56] Partial restraint on alienation, if reasonable, will be allowed,[57] and lands may be so granted, in trust, that in case the one to be benefited by the trust becomes bankrupt, or attempts to dispose of them, they shall revert to the donor,[58] and the interest of the bankrupt in such property thereby ceases.[59] This subject is considered more fully later.

78. **Liability to debts of deceased owner.**—Another feature of fee simple estates is that they are subject, though in the hands of the heir or devisee, to debts of all kinds contracted by the deceased tenant. This liability for debts of the tenant on such an estate, while general and undoubted now, was also of slow growth. It is said, that in the early periods of English history, the heir of a deceased person was bound, to the extent of the inheritance which descended to him, to pay such of the debts of his ancestor as the goods and chattels of the ancestor were not sufficient to satisfy, which rule was possibly borrowed from the Roman or Civil law. But the feudal system, seeking to keep the land free from personal obligations, infringed on this ancient rule, and in the reign of Edward I it was laid down by Britton that no one should be held to pay the debt of his ancestor,

[56] Schermerhorn v. Negus, 1 Denio 448 (N. Y.); Walker v. Vincent, 19 Pa. St. 369. See § 137.

[57] See §§ 148-151.

[58] Langdon v. Ingram's Guardian, 28 Ind. 360; McWilliams v. Nisly, 2 Ser. & R. 507 (Pa.); Oxley v. Lane, 35 N. Y. 340.

[59] Williams, Real Property (6th ed.), p. 94; Lockyer v. Savage, 2 Str. 947 (Eng.); Brandon v. Robinson, 18 Ves. 429 (Eng.).

whose heir he was, to any other person than the king, unless he were by the deed of his ancestor especially bound to do so. This continued to be the law of England for a long period, and unless the ancestor had, by a deed in writing, under seal, called a specialty, charged himself as well as his heirs with the payment of a debt or contract, it was not allowed to become a claim against his estate. In 1807, by statute, the fee simple estates of deceased traders were rendered liable to the payment not only of debts by which their heirs were bound, but also of their simple contract debts; and in 1833 this provision was made to apply to all owners of fee simple estates.[60]

In America the feudal doctrine, as regards the heir of an estate taking it free from the debts of the ancestor, never prevailed, and it is said that from the earliest settlement of the colonies, real estate has been liable to the debts and charges of the ancestor, in the hands of his devisees, his heirs, and bona fide purchasers from them. This common law principle has been ratified by statute in many of the states, in some cases dating back to colonial times. So that, as a general rule, in the United States, lands are liable for the debts of a decedent, whether due by matter of record, specialty, or simple contract. In the two latter cases, the existence of the debt creates no lien during the debtor's life. By his death, however, its quality is changed, and it becomes a lien upon his real estate, which descends to the heir or passes to the devisee, subject to the payment of all the debts of the ancestor, according to the laws of

[60] Williams, Real Property (6th ed.), pp. 79, 80.

the state in which the lands are situated; and the right of the creditor can, in most of the states, be enforced against the lands in the hands of a bona fide purchaser, within certain statutory limitations as to time.

The effect of this rule of law is of great importance. Suppose, for example, Jones dies, leaving little personal property, some real estate, and owing money to Smith. Smith will take the necessary steps to perfect the lien on the land and, until Smith's debt is paid, Jones' heir will be unable to sell the land, as no purchaser will buy it subject to this lien.

79. **Fee in incorporeal hereditaments.**—A fee simple may be held in incorporeal hereditaments as well as in corporeal hereditaments, though the owner was in ancient times said to be in his demesne as of fee of corporeal, and seized as of fee of incorporeal hereditaments. The distinction was that the latter issue out of lands which belong to another than him who owns a right of way or whatever the hereditament may be, and in such case the owner of the easement, as such a right would be called, has no ownership of the land itself, though he may own the easement to himself and his heirs as fully as he could the land.

CHAPTER XI.

DETERMINABLE OR BASE FEE.

80. **Definition.**—A determinable fee is a generic term covering all fees which are liable to be determined by some act or event expressed in the deed. A base or qualified fee is one with a qualification added to it which must be determined whenever the qualification annexed to it is at an end.[61] This estate is a fee because it may endure forever in a man and his heirs, yet as that duration depends upon the concurrence of collateral circumstances which qualify and debase the estate, it is, therefore, a qualified or base fee. While the estate continues the grantee has the same rights and privileges over his estate as if it were a fee simple, but it can only be conveyed subject to the qualifying conditions. A modern example of a base fee is a deed to the M. Canal Company "as long as used for said canal."[62] So a conveyance to a certain religious society and their assigns "so long as said real estate shall, by said society or its assigns, be devoted to the uses, interests, and support of certain religious doctrines,"[63] is a base fee.

An ancient example of this qualified fee is a grant

[61] Ahlfield v. Curtis, 229 Ill. 139, 82 N. E. 276, LEADING ILLUSTRATIVE CASES.

[62] State v. Brown, 27 N. J. Law 13.

[63] First Universalist Society v. Boland, 155 Mass. 171, 29 N. E. 524.

to "A and his heirs, tenants of the manor of Dale," and it is held that whenever the heirs of A cease to be tenants of that manor the grant is entirely defeated. On the other hand, a deed to A and his heirs during the widowhood of B, or while C resides in Rome, is measured by the life of a living person and is, therefore, a life estate and not a fee determinable.

The terms "base," "qualified," and "determinable" fees are, in modern times, practically interchangeable.[64]

81. **Incidents of base fee.**—So long as the first estate in fee lasts the owner has all the rights and incidents in it that he has in an absolute fee except that it is subject to the condition expressed in the grant. He may, for example, sell it or mortgage it, and it is subject to his debts when he dies, his wife may have dower in it, and it will descend to his heirs on his death.

82. **When base fee or reversion becomes a fee simple.**—The interest of the grantor who takes on the happening of the condition terminating a base fee, is called a reversion.

A determinable fee may become a fee simple absolute by a merger of the fee and the reversion in some one person or by the extinguishing of the possibility of the reversion. So if there is an estate to A and his heirs so long as a certain tree stands, then to B, and B conveys to A, A thereupon has a fee simple absolute. If the estate was to A and his heirs

[64] See valuable article on determinable fees in 17 Harvard Law Review 297; Christopher Corbet's Case, 2 And. 134, 138, 139 (Eng.), LEADING ILLUSTRATIVE CASES.

until B returned from Rome and B died at Rome before returning, A's estate becomes absolute. On the other hand if the estate is on condition and the condition is performed, the estate becomes, thereby, absolute in the holder of the reversion. For example, if there is a grant to A and his heirs so long as a certain tree stands and the tree falls, thereupon the holder of the reversion has an absolute estate.

83. **Conditional fee distinguished from estate upon condition.**—A conditional fee at common law was somewhat different from an estate upon condition and applied to those fees which were restricted to some particular heirs, as in the case of a deed to one and the heirs of his body or the heirs male of his body.

84. **Conditional limitation distinguished from condition.**—Conditional limitation is another term used to signify a qualified fee and is distinguished from an estate upon condition, as in the case of a conditional limitation the estate determines at once upon the happening of the event expressed, while in the case of an estate upon condition the estate is liable to be defeated, but is not in fact closed until the person who has the right to avail himself of the condition enters and determines the estate.

For example, if an owner of land dies and leaves a will giving land to Smith on the express condition that he use it as a farm, this is an estate upon condition; while if the will reads that Smith is to hold the land so long as it is used for a farm, and when it ceases to be used as a farm, then the land is to go to Jones, this is a conditional limitation.

85. **Reversion and possibility distinguished.**— The estate after the fee determinable is a reversion wherever it is certain that the event must take place, while if the event is uncertain the second owner has merely a possibility. So an estate to one and his heirs so long as a tree stands is one where there is a reversion, as it is certain that the tree must be destroyed at some time. On the other hand if the deed is to A and his heirs until B come back from Rome, B's right to the estate when he comes back is not a reversion, but a mere possibility, as it is uncertain whether he will ever come back or not.

CHAPTER XII.

ESTATES TAIL.

86. **Nature—Terminology.**—An estate tail arose when land was granted to a man *and the heirs of his body.*[65] It is such an estate as will descend, on the decease of the first owner, to all of his lawful issue, children, grandchildren, and more remote descendants, so long as his posterity endures—in a regular order and course of descent from one to another; and, on the other hand, if the first owner should die without issue, his estate, if left alone, will then determine.

"An estate tail may be either *general,* that is, to the heirs of his body generally and without restriction, in which case the estate will be descendible to every one of his lawful posterity in due course; or *special,* when it is restricted to certain heirs of his body, and does not go to all of them in general. Thus, if an estate be given to a man and the heirs of his body by a particular wife, here none can inherit but such as are his issue by the wife specified. Estates tail may be also in *tail male,* or in *tail female:* an estate in tail male cannot descend to any but males, and male descendants of males; so an estate in *tail female* can only descend to females, and female descendants of females."[66] The possessor of

[65] Lehndorf v. Cope, 122 Ill. 317, 112 N. E. 505, LEADING ILLUSTRATIVE CASES.

[66] 2 Blackstone, Commentaries, pp. 113, 114; Littleton, §§ 13-21, LEADING ILLUSTRATIVE CASES.

an estate tail is called a *donee* in tail, the words *donee, grantee,* and *lessee* being the correlatives of *donor, grantor,* and *lessor,* and used to distinguish the person for whom the act is done, from him who is to perform it. The donee in tail is also called a *tenant in tail,* since his possession is but a holding; his estate is also a freehold, being greater than an estate for life.

87. **Early history and construction.**—The life estates first granted by feudal lords soon developed into estates that were hereditary. To make such a grant we have seen that the word heirs had to be used. This term was at first limited to include only the direct issue of the tenant, but later the word heirs came to include collateral relatives, such as brothers and cousins of the tenant, so that if it was desired to limit the estate to the offspring of the donee, it was done by making a grant to A and the heirs of his body, making what was then considered a conditional gift, the condition being that if the donee died without such mentioned heirs, or upon the failure of such heirs at any future time, the land should revert to the donor.

88. **Estates tail a form of conditional fee.**—Estates tail were originally conditional fees, as if the grantee should not have heirs or issue according to the prescribed description, the land must go back to the grantor; while if the condition was fulfilled by the birth of heirs or issue the grantee had a fee simple. But if they descended to the issue and the issue became extinct there was still a reversion to the grantor.

89. **Words necessary in a deed and in a will.**— There is a wide difference between the latitude allowed to the donor in a deed and to the donor in a will. Deeds were at common law very strictly construed, whereas wills have always been construed according to the intention of the testator. So at common law to create an estate tail it is necessary in addition to the word "heirs" that there should be words of procreation to indicate the body from which the heirs are to proceed. In a deed these must be expressed, but in a will more latitude is allowed in getting at the testator's intent, so that the words "male heirs," for example, may be taken as equivalent to "male heirs of the body of the devisee."[67] Any language clearly indicating the testator's intent is enough, as in case of a devise to one and his heirs entail. Where a deed runs to a man and his heirs, male or female, it conveys an estate in fee simple, for there are no words to ascertain the body out of which they shall issue.

Blackstone observes, "As the word *heirs* is necessary to create a fee, so in farther limitation of the strictness of the feudal donation, the word *body,* or some other words of procreation, are necessary to make it a fee-tail, and ascertain to what heirs in particular the fee is limited. If, therefore, either the words of inheritance, or words of procreation, be omitted, albeit the others are inserted in the grant, this will not make an estate tail. As, if a grant be to a man and the *issue of his body,* to a man and his *seed,* to a man and his *children* or *offspring;* all

[67] Smith v. Collins, 17 R. I. 432, 22 Atl. 1018.

these are only estates for life, there wanting the words of inheritance, his heirs."[68]

90. **Gift over on failure of issue.**—An estate tail may be created in a will by implication, as if a testator makes a devise of land by will to Jones, with the condition that if Jones dies without issue, then the land is to go to Smith. The first question which arises here is as to when the issue of Jones must fail. Does it mean that Smith only gets the land if Jones has no children or their descendants living at the date of his death, or does it mean whenever the family or descendants of Jones all die, even though this may occur long after his death? The first is normally called a definite failure of issue, the second an indefinite failure of issue. And if the devise over upon failure of issue is an indefinite failure, the courts properly rule that this implies that the family and descendants of Jones must take by descent, and this means that they have an estate tail.

The general rule in this country is that a devise over on failure of issue means an indefinite failure of issue and creates an estate tail in the first taker. But the rule is the other way in some states, and the student must examine the law of his state for a solution of this question.

91. **Same subject.**—An estate tail may be implied in case of a devise to one and "his heirs in tail" or "on failure of issue," where it is evident that an indefinite failure is meant; or on failure of offspring; or sometimes the word "children" may be used in the sense of descendants in general. Where the de-

[68] 2 Blackstone, Commentaries, p. 114.

vise over after failure of issue is indefinite the devise over is void for remoteness as being opposed to the rule against perpetuities, which will be discussed in Chapter XXII, and a fee tail is created. If, however, the devise over on failure of issue is at a fixed time, if the fixed time is not too far away, it may create a valid executory devise, which will be discussed in Chapter XXI. An example of these rules is contained in an English case where the devise was "unto my son Joseph, his heirs and assigns, but in case my said son Joseph shall die without issue, then I give and devise the same messuage unto the child or children of which my wife is now enceinte (pregnant), his or her heirs." It was held that Joseph had an estate tail, as the court found that the testator intended that, if he had issue, that issue should take, otherwise the posthumous child should take; and this intention could only be effectuated by giving Joseph an estate tail. So the general language, "in case any of my said children unto whom I have bequeathed any of my real or copyhold estates shall die without issue, then I give the estate of him or them so dying unto his or their right heirs," was held to create an estate tail, as the court found it settled that if a man devise an estate to A and his heirs and afterwards gives the estate to another in case A dies without issue, the subsequent words reduce A's estate to an estate tail and restrict the general word "heirs" to mean only heirs of the body. So an early Massachusetts case[69] contained the language, "in case my son John, aforesaid, should

[69] Hulburt v. Emerson, 16 Mass. 241.

leave no male issue, then one-half of the above bequests to be equally divided among his children and the other half equally among all my surviving children." The courts held that the devise to John was an estate tail male general.

In some courts, as in Connecticut, however, where the words "dying without issue" have been construed to mean "dying without living issue at the time of death," a limitation over on the death of the first devisee without issue will not create an estate tail.

92. **The rule in Wild's Case.**—If a devise leaves to A and his children and A has children living, they all take together at common law as joint tenants for life.

However, under the rule in Wild's Case[70] a devise to A and his children when A has no children gives A an estate tail,[71] and this means when there are no children at all at the date of making the will. The word "children" becomes a word of limitation and not of purchase, and the rule applies, even though the gift is followed by a power on failure of issue. The object of the rule is to provide for unborn children as intended by the testator. The rule is one of construction and does not apply when the face of the will indicates an intention which would be defeated if the rule were followed. So where a will left real estate to the testator's wife for life and then to his three children and "to the child or children of the three said chil-

[70] 6 Rep. 17 (Eng.).
[71] Clifford v. Koe, 5 App. Cas. 447 (Eng.).

dren," and the first grandchild was born after the testator's death, the court holds that the rule in Wild's Case does not apply and that the share of each child is subject on his death to an executory limitation over to his children.[72]

93. **Growth of the right of alienation.**—In the earliest feudal times the ancestor had not the right to alienate his land so as to defeat the expectation of his heir, and the development of the right to alienate land was slow and extended over a long period of time. Part of the ancestor's land might be given as a marriage portion to his daughter, and to religious purposes, and lands so given became free from all manner of feudal service to the donor except the oath of fealty. At first lands were largely granted in consideration of services to be rendered, or a species of rent, there being no sales of land for cash, as is now customary. Gradually it came about that when a grant was made to A *and his heirs,* or the *heirs of his body,* A had the unquestioned right to dispose of such lands, so far as it was possible under the feudal system to dispose of them, and thereby cut off the expectancy of the heirs. In the reign of Henry III, it was established that though lands were granted to A and the heirs of his body, or to A and his heirs generally, A could by alienation cut off the expectancy of his heirs at once if the estate was granted to him and his heirs generally; and if to him and the heirs of his body, he could alienate the moment he had issue born satisfying the *condition* of the gift, and the alienee, or pur-

[72] Lewis v. Lewis, 128 Law Times 56 (English Ch. Div. 1909).

chaser, took the estate not only during the existence of the issue, but also after their failure.[73]

The tenant in tail might also have aliened the lands *before* issue born, but the effect of such alienation would only have been to exclude the lord during the life of the tenant, and during that of the issue, if such issue were subsequently born, while if the alienation were *after* the birth of issue, its effect was complete. The tenant in tail might also have aliened the lands *before* issue born, but the effect of such alienation would only have been to exclude the lord during the life of the tenant, and during that of the issue, if such issue were subsequently born, while if the alienation were *after* the birth of issue, its effect was complete.

94. **The Statute De Donis Conditionalibus.**—The right of the tenant in tail to alienate his holdings the moment he had issue born that satisfied the conditions of the grant, was distasteful to the barons of the reign of Edward I, since it put an end to the reversions which they had intended should come about through the failure of issue. To remedy the evil to them, and restore the crumbling feudal system, they passed the famous Statute De Donis Conditionalibus,[74] also known as the Statute of Westminster the Second, or simply the Statute De Donis, by which it was enacted that from thenceforth the grant should be construed according to the conditions of the gift, that the will of the testator as expressed therein might be observed. This statute was

[73] Co. Lit. 43a; Williams, Real Property (6th ed.), p. 41.
[74] 13 Edward I.

intended to put an end to the right of a tenant in tail to dispose of holdings, and cause the property to remain intact to his issue, or on failure thereof to revert to the original donor.

"Since the passing of this statute, an estate given to a man and the heirs of his body has been always called an estate tail, or, more properly, an estate in *fee tail* (*feudum talliatum*). The word *fee* (*feudum*) anciently meant any estate feudally held by another person; but its meaning is now confined to estates of inheritance—that is, to estates which may descend to heirs; so that a *fee* may now be said to mean inheritance."[75] The word "tail" is derived from the French word "tailler," to cut, the inheritance being by the Statute De Donis cut down and confined to the heirs of the body strictly.

The effect of the Statute of De Donis, while satisfactory to the barons, or greater lords, was distasteful to the crown, as putting them beyond the penalties of forfeiture, since their estates were limited to their issue, and it became galling to the trading and industrious classes. "Children, it is said, grew disobedient when they knew they could not be set aside; farmers were deprived of their leases; creditors were defrauded of their debts; and innumerable latent entails were produced to deprive purchasers of the land they had fairly bought; treasons also were encouraged, as estates tail were not liable to forfeiture longer than for the tenant's life."[76] The nobility, notwithstanding these evils, would not

[75] Williams, Real Property (6th ed.), p. 43; Wright's Tenures, pp. 5, 149.
[76] Williams, Real Property (6th ed.), p. 44.

consent to repeal the statute, and entails existed in all their severity for a period of two hundred years, when alienation of such estates was again introduced by a scheme well worthy of the astuteness of the common law judges and lawyers.[77]

95. **Statute De Donis not applicable to personalty.** —The Statute De Donis protected the entail only in "inheritances," and Lord Coke writes that inheritances included not only all inheritances even though they do not lie in tenure, such as rents, estovers, commons or other profits created out of land or uses, but offices or dignities, which concern lands or certain places. But if the grant is of a personal inheritance or has to do with personal property, no entail as to it can be created, and any gift by words which would create an estate tail in real estate will give an absolute estate in personal property.

96. **Common recoveries.**—The right of the tenant in tail to alienate his land being denied by the Statute De Donis, and a repeal of the statute being impossible, the only way was to devise some new plan by which the holding of the donee in tail could be transferred to another, and the entail destroyed. This was accomplished by an unheralded decision of the common law judges in the twelfth year of the reign of Edward IV, which is thus explained by Williams:

"In this case, called Taltarum's Case, the destruction of an entail was accomplished by judicial proceedings collusively taken against a tenant in tail for the recovery of the lands entailed. Such proceedings were not at that period quite unknown to

[77] 2 Blackstone, Commentaries, pp. 116, 358; Taltarum's Case, § 96.

the English law, for the monks had previously hit upon a similar device for the purpose of evading the statutes of mortmain, by which open conveyances of lands to their religious houses had been prohibited; and this device they had practiced with considerable success till restrained by act of Parliament. In the case of which we are now speaking, the law would not allow the entail to be destroyed simply by the recovery of the lands entailed, by a friendly plaintiff on a fictitious title; this would have been too barefaced; and in such a case the issue of the tenant, claiming under the gift to him in tail, might have recovered the lands by means of a writ of *formedon,* so called, because they claimed per *formam doni,* according to the form of the gift, which the statute had declared should be observed. The alienation of the lands entailed was effected in a more circuitous mode, by judicial sanction being given to the following proceedings, which afterwards came into frequent and open use, and had some little show of justice to the issue, though without any of its reality. The tenant in tail, on the collusive action being brought, was allowed to bring into court some third person, presumed to have been the original grantor of the estate tail. The tenant then alleged that this third person had warranted the title; and accordingly begged that he might defend the title which he had so warranted. This third person was, accordingly, called on, who, in fact, had had nothing to do with the matter; but, being a party in the scheme, he admitted the alleged warranty, and then allowed judgment to go against himself by default. Where-

upon judgment was given for the demandant, or plaintiff, to recover the lands from the tenant in tail; and the tenant in tail had judgment empowering him to recover a recompense in lands of equal value from the defaulter, who had thus cruelly failed in defending his title. If any such lands had been recovered under the judgment, they would have been held by the tenant for an estate tail, and would have descended to the issue, in lieu of those which were lost by the warrantor's default. But the defaulter, on whom the burden was thus cast, was a man who had no lands to give, some man of straw, who could easily be prevailed on to undertake the responsibility; and, in later times, the crier of the court was usually employed. So that, whilst the issue had still the judgment of the court in their favor, unfortunately for them it was against the wrong person; and virtually their right was defeated, and the estate tail was said to be barred. Not only were the issue barred of their right, but the donor, who had made the grant, and to whom the lands were to revert on failure of issue, had his reversion barred at the same time. So also all estates which the donor might have given to other persons, expectant on the decease of the tenant in tail without issue (and which estates are called remainders expectant on the estate tail) were equally barred. The demandant, in whose favor judgment was given, became possessed of an estate in fee simple in the lands; an estate the largest allowed by law, and bringing with it the fullest powers of alienation, as will be hereafter explained; and the demandant, being a friend of the tenant in tail, of

course, disposed of the estate in fee simple according to his wishes."[78]

This system of barring an estate tail, known as suffering common recoveries, held its ground because of the substantial benefits to the general mass of people, and was perfected into a regular procedure, a privilege inseparably incident to an estate tail, which could not be restrained by custom, statute, or covenant.[79] In later times the proceedings became still more complex and as they passed through numerous hands, mistakes were often made and great expense always incurred.

97. **Other methods of docking entail.**—Beside the common recovery it was held gradually that the entail might be docked in other ways than by the fictitious common recovery. For example, leases which did not prejudice the issue were held to bind the issue. And so an appointment by the tenant to charitable uses was sustained under the statute of Elizabeth, which provided for charitable uses. Entails were also allowed to be barred by a system of fines, or fictitious suits, commenced and then compromised by leave of court.[80] Both of these systems were later supplanted by an act of Parliament, which permitted a tenant in tail in possession by a simple deed enrolled in the Court of Chancery to dispose of the lands entailed for an estate in fee simple.[81]

[78] Real Property (5th ed.), pp. 44, 45. See also, 2 Blackstone, Commentaries, p. 360.

[79] Taylor v. Horde, 1 Burrow 60 (Eng.); Dewitt v. Eldred, 4 W. & S. App. 421 (Eng.).

[80] 2 Blackstone, Commentaries, p. 348.

[81] Williams, Real Property (6th ed.), p. 48; 3 & 4 Williams IV, c. 74.

98. **Exceptions to the right of tenant in tail to bar the entail.**—There were several cases in which the tenant in tail was not permitted to bar the entail as shown in the last section. Estates tail granted by the crown as a reward for public services could not be barred so long as the reversion remained in the crown. So it was held that an estate tail could not be barred by any person who is tenant in tail after possibility of issue extinct, as where an estate has been given to A and the heirs of his body by his present wife, and the wife dies without issue, A is then a tenant in tail after possibility of issue extinct, and could not suffer a common recovery so as to bar the reversion.[82]

99. **Effect of conveyance by tenant today.**—At common law a conveyance by a tenant in tail gave the grantee a base fee simple determinable on the death of the tenant in tail by the entry of the issue in tail. This base fee in the grantee has now been altered into a fee simple absolute almost everywhere by statute. In Canada and such sections of the United States as have not abolished entails by statute, the tenant in tail may bar the entail by a simple deed acknowledged for that purpose.[83]

100. **Rights and liabilities of tenant.**—The tenant in tail could cut down timber and commit waste, without first barring the entail. He was also allowed by statute to make leases of the land, not to exceed twenty-one years, or three lives, from the day of making thereof, and the accustomed yearly

[82] 2 Blackstone, Commentaries, pp. 124, 125.
[83] Rev. Stats. of Canada, 100; Purdon's Digest, 721.

rent had to be reserved. By statute, and otherwise, in England, estates tail are chargeable with the judgments for debts owing by the tenant in tail, and may also be disposed of in bankruptcy proceedings against the tenant in tail.[84] An estate tail will descend if not barred to the issue of the donee, in due course of law, and in the same way as an estate in fee simple descends, as will hereafter be explained. Such estates are subject to the reciprocal claims of husband and wife in each other's property, as will also be hereafter explained.

101. **Estates tail in the United States.**—Estates tail were brought into the American colonies with the rest of the common law of England and are therefore a part of the common law of this country, and cases where these estates are affirmed are occasionally found in our books, where, due to special circumstances, the statutes abolishing them were not applicable. In most states, however, the estate tail cannot subsist today, but by law is converted into a fee simple. In Massachusetts, for example, there are many cases where an estate tail is created, but a deed in common form will bar the entail to such estate. In the absence of such a deed the estate still subsists. The law as to estates tail is, therefore, important in any state where the statute does not expressly convert an estate tail into a fee simple.

In some states by statute the first donee takes an estate for life with remainder in fee simple to the issue of the donee. This is the result, for example,

[84] Williams, Real Property (6th ed.), pp. 56, 57.

in Connecticut, Illinois, Missouri, New Jersey, Ohio and in some other states.

102. **Statutes abolishing estates tail—Constitutionality.**—Estates tail have not been favored in this country and though the law relating to them in England remained practically unchanged by statute until 1834, as early as 1776 Virginia had a statute aimed at their abolition. Today, in most states, they have been abolished, or easy methods of attacking them have been provided. The commonest type of legislation converts what would otherwise be a fee tail into a fee simple. In several jurisdictions a fee simple is created in those coming after the first tenant in tail. Since the necessary result of such statutes is that the first donee has less power to convey than he would have as tenant in tail, they are scarcely an aid to the free disposition of land. In a few states the legislature has made a simple deed sufficient to bar the entail. Many of these acts apply only to persons "seized" of an estate tail, apparently leaving equitable estates unaffected unless the analogy to law is again followed by equity.

The application of such statutes to estates already created has been opposed as impairing vested rights. If common recoveries still existed, a statute which cut down the interest of the first taker to a life estate and thereby destroyed the common law right to suffer a recovery, would impair a vested property right. But a statute which destroyed the future interests or made them more readily destructible would change merely the mode of breaking the entail and would be constitutional. If a common recovery is

impossible, the matter cannot be so easily dismissed. Though the interest of the issue of the tenant in tail is not a vested right, a contingent remainder[85] seems to be in a constitutional sense a vested right. All the more clearly does a reversion or vested remainder[86] come within the protection of the Fourteenth Amendment to the Federal Constitution. Since there must always be a reversion or a vested remainder in fee simple, these statutes in such a jurisdiction would seem necessarily to impair vested rights. So in Rhode Island, where according to the court equitable estates tail could not be barred by any existing method, a statute which allowed such estates already created to be turned into estates in fee simple was held unconstitutional.[87] This results in making the remainders and reversions practically indestructible. But the land need not remain inalienable; for apparently the tenant in tail might be authorized by statute to convey an interest like a base fee.

[85] Treated in Chap. XX.
[86] Treated in Chap. XIX.
[87] Green v. Edwards, 31 R. I. 1, 77 Atl. 188.

CHAPTER XIII.

RULE IN SHELLEY'S CASE.

103. **Statement of rule.**—The rule in Shelley's Case is a legal construction placed upon the words, "the heirs," "heirs of his body," and the like when used in a conveyance giving the grantee a freehold estate. The rule is stated thus: "When the ancestor, by any gift or conveyance (assurance), takes an estate of freehold, and by the same gift or conveyance, an estate is limited, either mediately or immediately, to his heirs in fee or in tail, in such case the expression 'the heirs' are words of limitation of the estate, and not words of purchase."[88] (A word of limitation is any expression like the word "heirs," which indicates what estate the first taker is to have, while a word of purchase is a word indicating who is to take after the first taker.)

This rule takes its name from a celebrated case in Lord Coke's time, in which the rule was plainly formulated and laid down, but was in fact of much earlier origin.[89]

The rule as enunciated needs some explanation on account of the wrong meaning that might be given to the word "limitation." The explanation given by Williams, in his treatise, may be used for this purpose:

[88] Williams, Real Property (6th ed.), p. 454, note.
[89] Shelley's Case, 1 Rep. 93, 104 (Eng.).

"We have already seen that, in ancient times, the feudal holding of an estate granted to a vassal continued only for his life. And from the earliest times to the present day a grant or conveyance of lands, made by any instrument (a will only excepted), to AB simply, without further words, will give him an estate for his life, and no longer. If the grant was anciently made to him and his heirs, his heir, on his death, became entitled; and it was not in the power of the ancestor to prevent the descent of his estate accordingly. He could not sell it without the consent of his lord; much less could he then devise it by his will. The ownership of an estate in fee simple was then but little more advantageous than the possession of a life interest at the present day. The powers of alienation belonging to such ownership, together with the liabilities to which it is subject, have almost all been of slow and gradual growth, as has already been pointed out. A tenant in fee simple was, accordingly, a person who held to him and his heirs; that is, the land was given to him to hold for his life, and to his heirs to hold after his decease. It cannot, therefore, be wondered at that a gift expressly in these terms, 'To A for his life, and after his decease to his heirs,' should have been anciently regarded as identical with a gift to A and his heirs, that is, a gift in fee simple. Nor, if such was the law formerly, can it be a matter of surprise that the same rule should have continued to prevail up to the present time. Such indeed has been the case. Notwithstanding the vast power of alienation now possessed by a tenant in fee simple,

and the great liability of such an estate to involuntary alienation for the purpose of satisfying the debts of the present tenant, the same rule still holds; and a grant to A for his life, and after his decease to his heirs, will now convey to him an estate in fee simple, with all its incidents; and in the same manner, a grant to A for his life, and after his decease to the heirs of his body, will now convey to him an estate tail as effectually as a grant to him and the heirs of his body. In these cases, therefore, as well as in ordinary limitations to A and his heirs, or to A and the heirs of his body, the words heirs and heirs of his body are said to be words of limitation; that is, words which limit or mark out the estate to be taken by the grantee. At the present time, when the heir is perhaps the last person likely to get the estate, these words of limitation are regarded simply as formal means of conferring powers and privileges on the grantee—as mere technicalities, and nothing more. But, in ancient times, these same words of limitation really meant what they said, and gave estate to the heirs or the heirs of the body of the grantee, after his decease, according to the letter of the gift."[90]

104. **Origin and reason for rule.**—"The origin of the rule, however plausible may be the suggestions of learned men upon the subject, is lost in obscurity; but whatever that may be, or whether its continuance can be justified upon any rational grounds, it

[90] Williams, Real Property (6th ed.), pp. 254, 255; Lehndorf v. Cope, 122 Ill. 317, 112 N. E. 505, LEADING ILLUSTRATIVE CASES; Hardage v. Stroope, 58 Ark. 303, 24 S. W. 490.

still remains as firmly rooted in English jurisprudence as any other rule whose origin is clear, and whose utility is manifest."[91]

One reason for the rule is that if the heirs take as purchasers (as persons described separately in the will or deed) the lord will lose the feudal incidents and this will prevent forfeiture for treason and other possibilities of the lord's recovering the property. Furthermore the estate would be kept away from the creditors. But this latter is a purely modern reason. A better reason for the rule is that if the rule did not apply, then A would get nothing under the old common law, as a devise to A for life, remainder to his heirs, would give A a life estate and the heirs would have a contingent remainder. The rule is ancient, and contingent remainders are modern, and so it was necessary to adopt the rule to make the remainder of any effect.

The rule has been stated to be due to the aversion of the common law to allowing the inheritance to be in abeyance. Another reason of the rule lies in the desire to facilitate the alienation of land and to allow its alienation one generation sooner by vesting the inheritance in the ancestor. Lord Mansfield suggested that the rule was introduced not only to save to the lord the feudal fruits and services, but likewise for the benefit of specialty creditors. The rule has been thus explained in an Indiana case: "The word 'heirs, or heirs of the body,' creates the remainder in fee or in tail, and the theory of the rule is that the law, to prevent an abeyance, vests

[91] Tudor's Leading Cases on Real Property, p. 482.

the remainder in the ancestor, who is the tenant for life, and by a conjunction of the two estates the estate for life is swallowed up or merged in the remainder which is executed on the estate for life and the tenant for life thereby becomes the tenant in fee or in tail."[92]

105. **Effect of rule.**—In effect, the rule in Shelley's Case determines when a tenant having a freehold grant shall be free to alienate it or bar the issue in tail, though the word "heir" is mentioned in the grant. It being held that in such cases the words "heirs" or "heirs of his body" are not words of purchase, designating the person who takes under the deed, which would give the heir a present interest that could not be cut off by the grantee, but are simply to describe or limit—in the sense of bounding—the estate conveyed. That is, if lands are given or granted to A, and after his death to his heirs; or to A for life, then to B for life, remainder to the heirs of A, this immediate or mediate limitation to the heirs of A, under the rule in Shelley's Case, does not make such heirs purchasers, or confer upon them any interest in the grant which A cannot cut off by alienation. The words are descriptive of the estate given A, showing that it is larger than a life estate, and not descriptive of the persons who take the fee. So that the result of the rule is that A takes such an estate free from any obligations to the heirs, except such as were incident to an estate tail, and already discussed, to bar which, in early times, he would have to suffer a common recovery.

[92] Siceloff v. Redman's Adm'r., 26 Ind. 251.

106. **Same subject.**—The rule in Shelley's Case applies in the following cases: Where there is a limitation to A for a freehold and then to his heirs, the estate to the heirs is called an estate to A. So an estate to A and the heirs of his body with remainder to the heirs of A gives an estate tail in A and the remainder in fee to A. An estate to A for life, remainder to B for life, and remainder to heirs of A, gives a remainder in fee to A.

Where there is an estate to A for life, remainder to his eldest son, the rule does not apply, as the heir may not be the eldest son, who may die before A. The rule has no effect where the grant or devise is to "A and his heirs" or "to A and the heirs of his body," as this estate is either a fee simple or a fee tail.

107. **A rule of property and not of construction.**—The rule in Shelley's Case is, therefore, a rule of law, since it is a rule which determines the force, meaning and legal effect of the words "his heirs" when used in connection with other words and phrases.[93] Some cases in certain states have established the principle that the rule is one of construction rather than a rule of property. Decisions to this effect may be found in Indiana, Illinois, North Carolina, Pennsylvania, Iowa and Vermont. Such decisions have been disapproved by later cases in Indiana, Illinois and Pennsylvania.

108. **Cases where the rule in Shelley's Case does not apply.**—There are several cases where the rule in Shelley's Case does not apply, or which may be

[93] Tiedeman, Leading Cases, p. 355.

denominated as exceptions to the rule; these are:—

1. Cases where the ancestor is not granted an estate of freehold, that is, his estate is less than a life interest.

2. Cases where no estate of inheritance is given to the heirs.

3. Cases where other explanatory words are subjoined to the word heirs showing an intent to have them take as purchasers.

4. Cases where the new estate of inheritance is grafted upon the heirs of his body, and the heirs are thereby made the stock of descent, rather than the ancestor.

These cases or exceptions we will now consider briefly.

109. **Cases where no freehold is given the ancestor, or estate of inheritance to the heirs.**—The first two exceptions to the rule may be considered together, as the reasoning is the same. If the estate given to the ancestor is less than a freehold, it is a mere chattel. There is no seisin of the fee in him, and this being in another, the words "his heirs" become words of purchase, indicating the persons who are to be seized of the freehold, and the first tenant takes but a chattel real, or possession for a term of years. If the life estate is given to the heirs, and the freehold to the ancestor, as where an estate of freehold is granted to A, remainder at his death to his heirs, or to the heirs of his body in fee, he would take an estate of freehold in fee simple, or fee tail, as the case might be. Whereas, if A grants an estate to B for five hundred years, remainder to his

heirs, B takes an estate for five hundred years, and the heirs take the remainder in fee. When the first estate is less than a freehold, as for a term of years, the ancestor does not take the fee simple or fee tail. While if an estate is given to A for life, remainder to his heirs for life, then there are two life estates, and the whole fee has not been granted to either the ancestor or the heirs, but is still in remainder. In such a case the word "heirs" becomes a word of purchase, and is not descriptive of the estate granted to the ancestor. The ancestor takes but a life estate, and the word "heirs" is not necessary to create such an estate.

110. **When the effect of the word "heirs" is changed by explanatory words.**—It is a primary rule in the construction of wills, and devises therein made, as well as in the construction of a deed, to ascertain the intent with which it was executed, and to give effect to every phrase and clause if possible. So where there is a provision in the will or deed wholly inconsistent with a fee simple or fee tail vesting in the ancestor, then the heirs mentioned in such grant must be construed to take as purchasers, and the word "heirs" is not construed under the rule in Shelley's Case as describing the estate of the ancestor.[94]

The rule applies only when the words "heirs" or "heirs of the body" are used in their technical sense as creating a fee or a fee tail. If the word "heirs," for example, means really children or some like word then the rule does not apply.

[94] Perrin v. Blake, 4 Burr. 2579 (Eng.).

The rule resulted in a fixed and definite legal construction of the words "his heirs."

This meaning, it is to be understood, was the legal and technical meaning, but as regards devises, while the testator is presumed to have this technical meaning in view, yet this presumption may be overcome by showing that such an intent is inconsistent with the express meaning of the grant taken as a whole.[95]

A simple example of the rule is of a limitation to A for life, remainder to A's X. The real difficulty is to find out what X is. The word "heirs" may not mean heirs and some other word may mean heirs. If X does not mean heirs then the rule does not apply and it is construed as any other limitation. A gift to A for life with remainder to A's heirs or the heirs of his body and then the remainder to A's heirs is equal to a remainder to A. Then A has two estates and if there is nothing between them they merge and if there is something between them, that keeps them apart. The whole system of settlements in England grew up around the rule in Shelley's Case which prevented estates being given to A for life and then to A's heirs. Property therefore had to be settled or left in trust to accomplish this result.

111. **Where the new estate of inheritance is grafted on the heirs, the rule does not apply.**—When the freehold estate for life is given to the ancestor, with the remainder to the heir in fee tail, that is, the heir is made the stock of descent instead of the ancestor, the ancestor does not take an estate in fee or in

[95] 62 Ill. 86.

fee tail, but simply a life estate, and the second taker secures the estate tail. In such cases, the grantor has in mind that the first tenant should have a life estate, and the remainder should go to his oldest son, and to the oldest son of the oldest son. The courts hold the words in such a grant are not descriptive of the estate given to the first taker, because the ancestor has taken the precaution to point out that the estate shall go to the son after the death of the first taker, and to the heirs of that son, and, therefore, the son and not the ancestor is made the stock of descent.[96]

112. **Remainder to heirs of two persons who may have common heir.**—Where a freehold is given to one with a remainder to the heir or heirs of the body of that person and another by copulative words, and such persons are capable of having a common heir, that is, where they are of opposite sexes and are not of so close a relationship that they cannot lawfully marry, then the rule does not apply and the heirs take a contingent remainder in fee simple or fee tail. For example, in case of a devise to the testator's wife "during her life, remainder to the issue of her body by me begotten, provided also that such issue live to a lawful age, and on failure thereof remainder over," the court holds that the rule does not apply to this devise, but that the wife took an estate for life with contingent remainder over in case of the death of the issue before reaching lawful age.[97] But

[96] 1 Coke Rep. 66; 2 P. Wms. 176 (Eng); 17 B. Mon. 228 (Ky.); 13 R. L. 71.

[97] Helm v. Friskie, 59 Ind. 526. See Chap. XX.

a deed to A and the heirs of her body by B, who was her husband, gave A a fee tail under the rule in Shelley's Case which was enlarged to a fee simple by the statute abolishing estates tail.[98]

113. **Other examples where the rule does not apply.**—The rule in Shelley's Case requires that the freehold shall be granted to the ancestor, and in the same instrument the fee simple or fee tail shall be limited to his heirs. Consequently if a freehold is given to A, and remainder to the heirs of B, in fee or fee tail, the heirs of B will take as purchasers.[99]

Again, in order that the rule in Shelley's Case may apply, the estate granted to the ancestor and the heir must in each case be both legal or both equitable estates. Thus, suppose an estate for life is given to A, and remainder to his heirs, in trust. In this case the word "heirs" cannot be used as descriptive of the estate given to A, because the estate given to him is a legal estate, and the remainder goes to his heirs in trust—an equitable estate. Hence it follows, that the word "heirs" cannot be descriptive of the estate given to the ancestor if the estate given the ancestor is different from the estate given to the heirs.[1] The estate may be legal in form and equitable in fact, or vice versa.

In Iowa there seems to be a distinction between deeds and wills and the court has declared the rule in Shelley's Case applicable to deeds and not to

[98] Tipton v. La Rose, 27 Ind. 484. See § 117.

[99] Co. Lit. 378a; 2 Coke 51; 10 Coke 50; 3 Coke 20; Barnitz's Lessee v. Casey, 7 Cranch 456 (U. S.).

[1] Silvester v. Wilson, 2 Term Rep. 444 (Eng.); Baker v. Scott, 62 Ill. 86; in re Mannerback's Estate, 133 Pa. St. 342, 19 Atl. 552.

wills.[2] Such a distinction has no basis in the law and does not prevail in any other state.

114. **Executory trusts—Marriage settlements.**—The rule in Shelley's Case does not apply to executory trusts, which are those trusts not completely declared but which are to be determined by the trustee with the aid of the court. Such a trust must be distinguished from a trust executory in the sense that it is not executed by the Statute of Uses,[3] which is treated in Chapter XVII of this article. Therefore the rule does not apply to marriage settlements, which are considered as creating executory trusts, unless the settlement has been actually completed by a formal deed.

115. **Joint estates.**—Where there is a gift to A and B so long as they shall jointly live, remainder to the right heirs of the one who dies first, the rule in Shelley's Case applies, as in such event the heirs take their title through the ancestor by descent and not by purchase. So devises to the husband and wife during their joint lives and on their deaths to their heirs have been held to create in the husband and wife a fee simple.[4]

116. **Rule inapplicable to gift of income.**—In one leading case there was a bequest of the income to sons and daughters for life "and after their death the principal shall go and be paid to their children or children's children in the proper line of descent; but if either of my said children shall die without

[2] Doyle v. Andis, 127 Iowa 36, 102 N. W. 177; Westcott v. Meeker, 144 Iowa 311, 122 N. W. 964 W.

[3] Berry v. Williamson, 11 B. Mon. 245, 265 (Ky.).

[4] McFeely's Lessee v. Moore's Heirs, 5 Ohio 464.

living children or grandchildren as aforesaid or any direct descendants from their bodies begotten," then there was a reversion to the estate of the testator. The court holds that the rule in Shelley's Case did not apply, as there was only a bequest of the income with a devise over of the principal.[5]

117. **Equitable interests.**—The rule in Shelley's Case applies to equitable interests, although it was at first very doubtful under the early cases whether this was true. The only limitation of the rule is that both estates must be of the same quality. They must both be equitable or both be legal.[6]

118. **Contingencies.**—The rule may operate even though the subsequent limitation over is on a contingency. So on a limitation to A for life and if B should outlive her then to him for life and after the termination of such life estates then to the heirs of B, it was held that B took a contingent remainder,[7] and that until the happening of the contingency the rule in Shelley's Case could not operate; but on the happening of the contingency the rule takes effect.

119. **Personal property.**—The rule in Shelley's Case is strictly applicable only to real estate, but the principle of the rule is applied by analogy to personal property. So it is held that by analogy "under the rule that the words which create an estate tail, where the subject is realty, confer an absolute estate, where the subject is personalty, a gift to one for life in the personalty with remainder

[5] Harbster's Est., 133 Pa. St. 351, 19 Atl. 558.

[6] Steele v. Smith, 84 S. C. 464, 66 S. E. 200, LEADING ILLUSTRATIVE CASES. See § 113.

[7] See Chapter XX.

to the heirs of his body is an absolute gift to the first taker."[8]

120. **The rule in Shelley's Case in the United States.**—The rule in Shelley's Case is not generally in force in this country and its abolition has rendered the elaborate English settlement unnecessary, so that the discontinuance of the rule is a good thing. It has no practical application today, although it is still law in Pennsylvania and Delaware and it is recognized as part of the English common law by recent English cases. Statutes have been passed purporting to modify or abolish it in the following states: Alabama, California, Connecticut, Georgia, Kansas, Maine, Massachusetts, Michigan, Minnesota, Montana, New Hampshire (as to devises), New Jersey, New York, North Dakota, Rhode Island, South Dakota, Tennessee, Virginia, Washington.

[8] Keys Est., 4 Pa. Dist. 281.

CHAPTER XIV.

LIFE ESTATES.

121. **Origin.**—It is said by Blackstone and other writers that fees or estates were originally held at the will of the lord, and rose by degrees, through the stages of leases for years and for life, to the dignity of inheritances.[9] But Williams, in his work on Real Property, claims that an estate for life seems to have been the smallest estate in the conquered lands which the military tenant was disposed to accept.[10]

122. **Nature—Creation.**—The holder of a life estate is called a tenant for life, as he is only a holder of the lands. The life estate is a freehold, as it was considered worthy the acceptance of a freeman. Under the early law an estate *pur autre vie* (which was measured by the life of another) was not considered of sufficient dignity to be a freehold, but this distinction has disappeared. There are other estates which are considered in law as life estates, although they may not last during the person's life, as an estate to a woman during her widowhood. It also creates a life interest to make a grant to a man and woman during coverture or so long as a man shall live in a certain town or shall pay a certain sum, or so long as the grantee shall maintain salt works on the land. A reservation by a grantor of the use and

[9] 2 Blackstone, Commentaries, p. 57.
[10] Williams, Real Property (6th ed.), p. 17.

control of the granted premises during his life creates in him a life estate with all its incidents.

A life estate may be created by implication as where A devises his land to his heir after the death of B, and it is held that, as no one but the heir could take except under the will and as the heir is postponed to the death of B, B must be the tenant for life. But if the devise had been to a stranger after the death of B, then no such implication would arise and the estate until B died would go to the heir. An estate for life was at common law given or conferred by the same feudal rights and solemnities as fees themselves, requiring the ceremony of livery of seisin, for example.

123. **Right to assign or create sub-tenancies.**— One of the rights of a tenant for life was to assign his entire estate or carve out of it any smaller estates of which the nature of the case would permit. This resulted from the fact that the tenant for life, having a freehold estate, was regarded as the owner of an independent estate. It is a right which is not possessed by tenants of estates less than freehold, as, for example, a tenant for years cannot grant or assign without the consent of the landlord. A tenant for life could of course not lease or grant his holding to endure beyond his lifetime, unless such a power was given in his deed, and up to 1845, in England, an attempt so to do caused a forfeiture of his estate to the person next entitled.

The old theory that a tenant for life by making a conveyance of a greater estate than he has forfeits his estate at once is now obsolete in this country, as

such deeds convey only what the grantor has and nothing more.

124. **Estate pur autre vie.**—If the owner of an estate for his own life should dispose of it the new owner would become entitled to the estate for the life of the former. This was called, in the Norman French brought over by William the Conqueror, an estate pur autre vie and the person for whose life the land is held is called the cestui que vie. In this case the new owner was entitled only so long as he lived to enjoy the property unless the grant were expressly extended to his heirs. So that in case of the death of the new owner in the lifetime of the cestui que vie, the land was left without an occupant so long as the life of the latter continued, for the law would not allow him to re-enter after having parted with his life estate. As nobody had a right to the property any one might enter on the land, and whoever first entered might lawfully keep possession so long as the cestui que vie lived. The person who did enter was called a "general occupant." If, however, the estate was granted to a man and his heirs during the life of the cestui que vie the heir might and still may enter and hold possession and in such a case he is called in law a "special occupant," having a special right of occupancy by the terms of the grant.

125. **Statutes affecting estates pur autre vie.**—To remedy these difficulties, there was a statute passed in the reign of Charles II allowing the owner of an estate pur autre vie to dispose of it by his will, and ruling that if no such disposition was made the heir

should be charged with the debts of his ancestors, or in case there should be no special occupant that the estate should go to the executors and administrators and be subject to the payment of debts during the rest of the life of the cestui que vie. This statute raised the question whether, if the owner of an estate pur autre vie died without a will, the administrator was to be entitled for his own benefit after paying the debts, and therefore an explanatory act was passed in the reign of King George II by which the surplus after the payment of debts was distributed among the next of kin. The provisions of these statutes have been adopted in many of our states where estates pur autre vie are regarded as the real estate of the decedent and are subject to the payment of his debts.

There can be no such thing in this country as a common occupancy. That has been abolished by statute, and the disposition of the balance of the estate is regulated by statute.

126. **Fraud in case of estates pur autre vie.**—The owner of an estate pur autre vie evidently had an interest that the cestui que vie should live as long as possible and so he might attempt to conceal his death. In order to prevent such a fraud a statute was passed in the reign of Queen Anne requiring the occupant to produce the cestui que vie on proper proceedings, and providing that in case of his failure to do so it would be assumed that the cestui que vie was dead.

127. **Termination by civil death.**—A life estate may be determined by the civil death of the party

as well as by his natural death, and this is the reason why in conveyances the grant is usually made for the term of a man's natural life. Civil death occurred formerly when a person entered a monastery whereupon he became dead in law, or civil death might occur through attainder for treason or felony. The necessity in England for limiting a life estate to the "natural" life of the life tenant does not obtain in this country, where there is no such thing as civil death nor forfeiture of lands for felony.

128. **Merger.**—Life tenancy may be affected by the doctrine of merger, which applies where a greater and lesser estate unite in the same person, the smaller estate being extinguished. Thus an estate to A for life and the lives of B and C is cumulative and will continue during the lives of all three, but if it had been to A during the life of B with remainder to A, the estate to A would be considered a greater estate than that during the life of the cestui que vie and would therefore merge so that A would simply have an estate for his own life in himself. So if the owner of the reversion after an estate for life grant the reversion to the life tenant it will merge the life estate even though the grant is conditional. But if the life tenant surrenders to the remainderman on condition and then makes entry for breach of the condition the tenant for life is in again of his original estate and the life estate survives. The effect of such an operation is not a complete merger since the surrender is only by consent of a particular tenant, yet he and any remainderman or reversioner shall presently have possession.

If the life tenant leases the premises to the reversioner for the reversioner's life, the estate does not merge in the reversion because he has created an estate pur autre vie, which is a less estate than his own; and if he outlives the reversioner he will take the estate again for the balance of his own life.

129. **Apportionment of rent.**—At common law, where the life tenant had made a lease of the property to a sub-tenant the under-tenant could, on the death of the life tenant between two rent days, leave the premises without paying rent for occupation since the last rent day. But this rule has now been universally changed by statutes providing that the under-tenant must pay a proportionate part of the rent from the last rent day to the day of the death of the life tenant. It also used to be the law that if the life tenant died in the middle of the rent period his estate lost any part of the rent since the last rent day. But this has also been altered by statutes providing that such rents shall be apportioned between the estates of the life tenant and the remainderman.

130. **Rights of life tenant—Waste.**—A tenant for life had the right to cut wood for fuel purposes and for the making and repairing of farm implements, for repairing the house, hedges, and fences, and also the right to cut underwood but not timber. But he could not cut wood unnecessarily, or commit waste by the wilful destruction of any part of the premises, called voluntary waste, or by negligence permit the buildings to go to ruin, called permissive waste. The common law decisions as to

what constitutes waste on the part of such a tenant do not always apply in this country, as because of our forests and other dissimilar conditions it might be advisable to cut standing timber in order to clear the ground for farming.[11] At common law the life tenant could not plough up ancient meadow, or dig gravel, brick or stone, except in such pits as had heretofore been open and used, neither could he open new mines for coal or minerals, and if he did so it was held to constitute voluntary waste.[12] The subject of waste will be discussed more at length later.[13]

Life tenants were commonly given tenancies "without impeachment of waste" and when this occurred the tenants had certain rights which we will consider later under the topic, equitable waste.[14]

131. **Improvements.**—At common law a tenant for life had in general no right of compensation if he made improvements on the premises, as he was under no legal obligations to make any such improvements. Statutes in many states, however, now provide equitable process for compensating life tenants for improvements made with the consent of the reversioner.

132. **Duty to pay taxes and interest on incumbrances.**—Another duty of the tenant for life was that of paying taxes[15] and interest upon the existing

[11] Wilkinson v. Wilkinson, 59 Wis. 557; Stout v. Dunning, 72 Ind. 343.

[12] Simmons v. Norton, 7 Bing. 640 (Eng.); Viner v. Vaughan, 2 Beav. 466 (Eng.), Co. Lit. 54b.

[13] See Chapter XXXVIII.

[14] See § 416.

[15] Jenks v. Horton, 96 Mich. 13, 55 N. W. 372, LEADING ILLUSTRATIVE CASES.

incumbrances on the property. If the tenant purchased an outstanding incumbrance, this was regarded as having been done for the benefit of the reversioner, if the latter contributed his proportion of the sum paid therefor.

133. **Duty of tenant to defend title.**—One of the duties of the tenant for life was defending the title against the attack of an adverse claimant and to do this he had the privilege of calling on the remainderman to come in and aid him in making the defense. This was called "praying in aid." This custom of praying in aid once existed in Massachusetts, but has now been discontinued through the abolition of writs of right.

CHAPTER XV.

RESTRAINTS ON ALIENATION.

134. **Legal and equitable estates.**—It is a fundamental policy of our law that the owner of an estate in fee simple may alienate or subject it to the payment of his debts at any and all times. Any attempt to evade this right by deed or by will must be declared void.[16] No man may settle his own property so that he may have it until bankruptcy and then over to another. No legal estate in fee, in tail, for life, or for years can be restrained absolutely. The only possible exception to this is an equitable estate through the creation of what is now known as a spendthrift trust, and even where the spendthrift trust doctrine is recognized, the limitation is also generally made that a man may not create a spendthrift trust for himself.

135. **Restraint either direct or indirect.**—A restraint on alienation may be put in two ways, either indirectly, by saying that the donor shall be punished by forfeiture if he alienates; or directly, by saying that he shall not alienate. In the first place, if alienation takes place, then forfeiture follows. The second situation is a direct prohibition on alienation and the question then comes up whether

[16] Blackstone Bank v. Davis, 21 Pick. 42 (Mass.), LEADING ILLUSTRATIVE CASES; Anderson v. Cary, 36 Ohio St. 506. See Gray, Restraints on Alienation for an extended treatment of topics discussed in this chapter.

any conveyance made in violation of this prohibition is valid. An invalid provision against alienation does not defeat the estate to which it is annexed, but in such cases the gift stands and the invalid condition is rejected.[17]

136. **Restriction on the power to lease.**—The same principle applies to a restriction on the power of leasing as to a prohibition on selling land, and such restriction is, therefore, void.[18]

137. **Fees.**—There is a distinction in the validity of restraint on alienation between estates of inheritance and those not of inheritance. In early times there were various restrictions, but it is long settled that an absolute restraint on alienation of a fee is void. It has been said that the reason of this is that since the Statute of Quia Emptores there is no reversion and so no power in the grantor. But that is too broad a statement, for it would destroy all conditions, as, for example, not to use a building in a particular way. The real reason why there should be free conveyance of land is public policy.

It is settled that a provision annexed to a fee, legal or equitable, that the owner shall not alienate is bad. So a limitation on alienation in a particular way is also bad. A gift over unless the owner does something when he has a right to do what he pleases is for the same reasons generally held bad. Suppose, however, there is a gift to A and his heirs, but if A does not make a payment within one year, then over to B. That would be good, as according to

[17] McDonogh's Ex'rs v. Murdoch, 15 How. 367 (U. S.).
[18] In re Rosher, 26 Ch. Div. 801 (Eng.).

the old common law the test is whether the condition takes away the whole power of alienation. It is a question of substance and not of mere form.

138. **Conditional restraint on fee in general.**—A condition or conditional limitation restraining an owner in fee simple from selling his land is clearly bad, even when the restriction is limited in time. On the other hand, where the restraint is qualified as to persons, the authorities are in great conflict. One test put forth is "whether the condition takes away the whole power of alienation substantially." On the other hand, it is often laid down that a condition not to alienate to certain persons is good.[19]

139. **Limitations to particular persons.**—The law in this country is unsettled on the question of limiting the sale to particular persons. In England it seems there is some authority that a restriction may be made that the owner shall not alienate except to a certain class.[20] The law in this country probably is that you may exclude certain persons as grantees;[21] but you cannot exclude all the world except certain persons.

For example, it was properly held in a recent case that a prohibition on transferring property to any one except relatives of the testator and without the consent of all living descendants, which prohibition was in the form of a conditional limitation, was void.[22]

140. **Restriction for certain time.**—The weight of

[19] Windsor v. Mills, 157 Mass. 362, 32 N. E. 352.
[20] In re Macleay, 20 L. R. Eq. 186 (Eng.).
[21] McCullough's Heirs v. Gilmore, 11 Pa. St. 370.
[22] Manierre v. Welling, 32 R. I. 104, 78 Atl. 507.

authority in England and in this country on the question of time, is that where you have a fee the alienation of the land may not be restrained for a certain time. The original rule that you cannot annex to a gift in fee simple a condition which is repugnant to that gift is a plain and intelligible rule and no exceptions should be made to it.[23] In most jurisdictions a direction restraining alienation for a limited time of a legal estate is void, although it is held in Kentucky and Ontario that a limitation for a reasonable time will be upheld.[24]

141. **Perpetuities.**—A restraint on alienation for a limited time cannot, of course, extend beyond the period allowed by the rule against perpetuities, which is discussed under Chapter XXII and following chapters, and the same result can be effected by conveyance to trustees to hold for a certain time, which conveyance is undoubtedly good, unless the time limited exceeds the period allowed by the rule against perpetuities.

142. **Gifts to charities or legislative grants.**—One exception to the rule that the restraint or alienation of a fee cannot be prohibited is, in the first place, the case of gifts to charities, where the donor may impose conditions which prevent the diversion of the trust estate from the uses for which it was granted. Another exception is the case of legislative grants by the government where restrictions on the power of alienation are perfectly valid,[25] and

[23] Dean v. Mumford, 102 Mich. 510, 61 N. W. 7.
[24] Frazier v. Combs, 140 Ky. 77, 130 S. W. 812.
[25] Farrington v. Wilson, 29 Wis. 383.

a deed made by the grantee in violation of such restriction is void.[26]

143. **Grants to corporations.**—Another exception to the rule is a grant to a corporation under the old common law. But this exception, the effect of which was to give a reverter to the grantor on dissolution, it is not believed has any effect at the present time.[27]

144. **Estates tail.**—A provision that the devisee of an estate tail cannot suffer a common recovery is void. But where a married woman having an estate tail bars the entail and converts the estate tail into a fee simple, the same restraint which governed the estate tail will govern the new estate in fee.

145. **Life estates.**—In the case of a legal life estate a provision that the property conveyed or devised shall not be sold by the grantee or devisee as subject to the claims of his creditors is void.[28] But property may be granted or devised in such a way that the life estate may cease on the happening of a certain event, as a sale of the property or bankruptcy of the life tenant.

It is the English doctrine that a will which proposes to give to a devisee the income from real property so as to secure his enjoyment free from liability for his debts, is void on the grounds of public policy as being in fraud of the rights of creditors. It seems well settled in England that if property is given to a man for his life the devisor cannot take

[26] Smythe v. Henry, 41 Fed. 705.
[27] Murray v. Green, 64 Cal. 363, 28 Pac. 118.
[28] Ehrisman v. Sener, 162 Pa. St. 577, 29 Atl. 719.

away the incidents of a life estate. But it is equally well settled there that a devise of the income of property to cease on the insolvency or bankruptcy of the devisor is good, and that the limitation over is valid.

146. **Estates of married women.**—Another exception is in the case of equitable estates of married women, whether such estates are in fee or for life only.[29] The English court of chancery recognized the separate property of married women in the eighteenth century and then it was necessary, in order to protect her in that separate property, to prevent her alienation, as it was found that the husband would in effect control the property. So the court upheld restrictions of conveyances by married women for the sole purpose of protecting her against her husband. A gift in trust for life for the separate use of a married woman, or of one contemplating marriage, may be made subject to a restraint on alienation[30] in this country.

147. **Other estates.**—Conditions against alienation of estates for years are valid.[31] In case of a contingent remainder[32] or of any other interest not vested, a restriction upon the power of alienation to last as long as the interest remains contingent is valid.[33]

148. **The English rule as to spendthrift trusts.**—The English doctrine is that a direction that a trust to the first taker shall cease on his bankruptcy and

[29] Wells v. McCall, 64 Pa. St. 207.
[30] Simonton v. White, 93 Tex. 50, 53 S. W. 339.
[31] Camp v. Cleary, 76 Va. 140.
[32] See Chapter XX.
[33] Mandlebaum v. McDonnell, 29 Mich. 78.

shall then go to his wife or children is valid, and the entire interest passes to them, but if the devise be to him and his wife and children, or if he is in any way to receive a vested interest, that interest, whatever it may be, may be separated from that of his wife or children, and be paid over to his assignee. Where, however, the devise over is for the support of the bankrupt and his family in such manner as the trustees may think proper, the weight of authority in England seems to be against the proposition that anything is left to which the assignee can assert a valid claim. The question then arises whether a limitation to trustees giving them a pure discretion to use the property on the bankrupt is valid. It has never been held that a mere discretion is sufficient to give the possible object of that discretion an interest which could be attacked by creditors.

149. **The American rule as to spendthrift trusts.** —The Supreme Court of the United States in the leading case of Nichols v. Eaton,[84] refused to follow the English courts in the proposition that the power of alienation is a necessary incident to a life estate in real property. The Supreme Court regards the doctrine as of modern origin. The court sees no reason why a testator who gives without any pecuniary return may not attach to that gift the incidents of continued use or uninterrupted benefit of the gift during the life of the donee. The court believes that a parent may secure a child by protecting it from the vicissitudes of fortune or from its own incapacity. So a devise of the income from property

[84] Nichols v. Eaton, 91 U. S. 716, LEADING ILLUSTRATIVE CASES.

to cease on the insolvency or bankruptcy of the devisee is good, and the limitation over on such bankruptcy or alienation for the support of the wife is good. A mere discretion in the trustees that they may at any time transfer to the life tenant any portion not exceeding one-half of the trust fund, or may, in their discretion, apply to his use or that of his family the income to which he would have been entitled, was also good and any payments made by the trustees in the exercise of that discretion cannot be applied to the creditors. The Massachusetts rule has gone so far as to say that property may be left in trust for A without power of alienation or anticipation. This gives A a *right* to the income and the court nevertheless holds that this right cannot be reached by the creditors.[35]

150. **Jurisdictions opposed to the American rule.** —The doctrine of Nichols v. Eaton,[36] upholding what is commonly called a spendthrift trust, is not universal in this country, although now prevalent in most of the states.[37] It has, for example, never been adopted in Rhode Island.

A good example of the opposite rule is found in McCormick Harvesting Machine Co. v. Gates.[38] In this case the testator granted certain lands to his son, declaring, "It is my will that he shall use, occupy and enjoy the lands during his natural life, but without the power or ability to mortgage the same." It was also provided that no creditor of the

[35] Broadway Nat. Bank v. Adams, 133 Mass. 170.
[36] 91 U. S. 716, LEADING ILLUSTRATIVE CASES.
[37] Tillinghast v. Bradford, 5 R. I. 205.
[38] 75 Iowa 343, 39 N. W. 657.

devisee should have the power to take the land upon execution. Execution was taken out by a creditor of the son, and upon its being returned unsatisfied, a petition was filed to reach the property or land on which he was placed. The court held that the son had a life estate, and that this life estate was subject to levy upon execution by his creditors.

151. **Trusts for grantor.**—The only limitation on the American rule is that no man can settle property on himself so that it cannot be reached by creditors. This is distinguished from the case of a devise, as it is said there the devisor has the entire right of disposal of property and he can, if he sees fit, give his beneficiary a qualified and limited instead of an absolute interest in the income. The creditors of the beneficiary have no right to complain that the devisor did not give his property for their benefit. But when a man settles his property upon a trust in his own favor, with a clause restraining his power of alienating the income, he undertakes to get his own property out of the reach of his creditors, while he retains the beneficial use of it. The practical operation of the transaction is that he transfers a portion only of his interest, retaining in himself a beneficial interest which he attempts, by his own act, to render inalienable, and this is going farther than a sound public policy will justify.[39]

[39] Pacific Nat. Bank v. Windram, 133 Mass. 175.

CHAPTER XVI.

ESTATES UPON CONDITION.

152. **In general.**—An estate upon condition is one that may be created, enlarged or defeated, upon the happening of some uncertain event.[40] An implied condition as distinguished from an expressed condition is a condition which is annexed to the estate created, as, for example, in the case of a life estate or an estate for years, that the tenant should not attempt to create an estate greater than he had and that if he did he forfeited his own estate. Where there are several conditions precedent all must be performed before the estate can vest.

153. **Nature of an estate granted upon condition.**—When an estate is granted upon condition, the grantor does not part with his entire interest; he has reserved to himself and his heirs the right to re-enter upon breach of the condition, and the grantee takes subject to this right of re-entry. The grantor may by subsequent conveyance grant the interest he has reserved, and when these two interests are united the estate becomes a fee simple absolute. So that the right to re-enter is something more than an interest which belongs to an individual, it is a right incident to the land itself, being an interest which the grantor did not convey. The right of re-entry

[40] See Warner v. Bennett, 31 Conn. 468.

is reserved in the same instrument which creates the first estate.[41]

154. **Validity.**—In regard to all estates upon condition, it may be said as to the condition upon which the estate is limited, that it must be a good or valid condition, that is, it must be one not repugnant to the grant which has been made. Thus, if a man is granted a certain estate, and there are certain rights, powers and privileges passing as incident to that estate, a condition that he could not exercise those rights or powers, would not be good or valid, since it would be repugnant to the grant. Likewise, a condition to be good must not be contrary to, or in violation of, good morals or public policy. And a condition which in its very nature is impossible of performance is void, as the courts will never require or expect a man to perform what is impossible.

155. **Conditions precedent and subsequent defined.**—In the law of property, conditions are divided into two classes: precedent and subsequent. When the condition is precedent the estate does not come into existence until the condition is performed. Consequently it does not matter whether the condition is impossible, illegal or against public policy, it is always good in the sense that the estate upon condition precedent does not vest until the condition is performed. However, if it is a condition that is impossible to perform, or the condition is illegal and void, the estate never comes into existence. Hence in considering a condition precedent it is unnecessary

[41] As to distinction between a condition and a trust see Neely v. Hoskins, 84 Me. 386, 24 Atl. 882.

to ascertain whether it is against public policy or good morals, since such condition must be performed before the estate vests; in other words, the condition precedent does not enlarge the estate, but simply prevents it from ever coming into the possession of the grantee.[42] All that is necessary is to consider a condition precedent as one that is imposed upon the estate before it can vest, and when such condition is performed the estate vests.

A subsequent condition does not prevent the vesting of the estate, but it may restrict the enjoyment of the estate, and, in case it is not complied with, may terminate the estate by giving the grantor or his heirs the right to make a re-entry. Thus, every lease contains a condition that if the rent is not paid, the landlord may re-enter and take possession of the premises and terminate the lease. This is a condition subsequent. In this case, since the estate vests when the condition is subsequent, the tenant cannot be compelled to perform an impossible condition, or a condition that is against public policy, to prevent being divested of his estate, and such conditions, if imposed, are, therefore, void.

156. **Conditions subsequent.**—Conditions subsequent are always construed strictly and will never work a forfeiture unless they are clearly expressed in unequivocal terms or necessarily implied.[43] So a condition applying to the grantee or lessee cannot be taken advantage of by his heirs, executors, administrators or assigns, as in order to enable them

[42] Minot v. Prescott, 14 Mass. 496.

[43] Southwick v. New York Christian Missionary Society, 135 N. Y. Suppl. 392, 151 A. D. 116.

to take advantage of this condition they must be expressly named. Where there is a grant to A for life and thereafter to the use of his eldest son and his heirs if he live to the age of twenty-one years and upon condition that if he dies before twenty-one then the grant shall remain to the first taker, it is properly held that although these words may create a condition precedent, yet taking them altogether, they are not a condition precedent but a present devise to the eldest son and defeasible by a condition subsequent, that is, his not attaining the age of twenty-one. This was really an executory devise,[44] as it came after a fee in the first taker.

157. **Time of performing conditions.**—It has been said that where no special time is named for performing a condition, in the absence of other evidence there is a condition subsequent, while if the prompt performance of the condition is necessary to give the grantor or the beneficiary the benefits of it, it is held that the condition must be performed within a reasonable time.[45]

158. **Illegal or impossible conditions.**—At common law a feoffment made with a condition subsequent that is impossible of fulfillment at the date of feoffment, or becomes so by act of God, is absolute. But if there is a condition precedent, in that case there is no feoffment in effect at all. If a condition of a grant is *malum in se,* that is, if the condition of the grant is a commission of some crime involving moral turpitude, the whole grant is void. But if it is

[44] A form of future estate described in Chapter XXI.

[45] Hayden v. Inhabitants of Stoughton, 5 Pick. 528 (Mass.).

merely *malum prohibitum,* that is, if the condition involves the doing of something which is not morally wrong but is contrary to some statute, then the condition only is invalidated and the grant stands. A good example of *malum prohibitum* is a breach of the revenue laws against the importation of goods —the crime commonly known as smuggling.

This old doctrine of the common law was, however, borrowed from the civil law and does not seem to have been applied to real estate, so that in modern practice the doctrines of impossibility of conditions are of little or no weight. At the present time the rough rule which can be followed is that if an illegal condition is a condition subsequent then the condition is of no effect; and if it is a condition precedent, then the grant itself is of no effect. There is no question as to a condition subsequent that if it is impossible of operation or performance the condition is inoperative. The old civil law that a grant on a condition precedent which the donor knew was impossible might be sustained has never been adopted in this country. The ordinary Roman example, "a gift to Titus if he goes to the moon," is a provision which should not arise in the will of any sane man.

159. **Same subject.**—If a condition subsequent is impossible or unlawful at the time of creating the estate or becomes impossible by the act of feoffment or the act of God, it leaves the estate absolute, as the condition itself becomes void. For example, in a grant to A and his heirs on condition he shall marry B by such a day, if she dies before that day

or the grantor marries her himself, the estate is absolute; and so in case the condition is that the grantee shall commit some crime. The principle applies to estates for life or for years as well as to those in fee. But if an unlawful or impossible condition is a condition precedent the estate dependent on it fails and the grant or devise is wholly void.

160. **Conditions in restraint of marriage.**—Any condition in restraint of marriage is necessarily a condition subsequent, as otherwise the grantee must die to get the property. As the interest of the state is in favor of the growth of families any condition restraining marriage is against public policy and void. Gifts are often upheld, however, when they are made for the support of beneficiaries until marriage, where it is evident that the purpose of the donor was to keep the beneficiaries from want until marriage and the purpose was not to prevent the marriage itself. This is purely a question of construction of the intention of the donor in each particular case.

161. **A condition subsequent must not violate any rule of property.**—Rules of property are those by which certain incidents inhere in certain estates. These incidents are essential to the existence of the estates, and when a condition subsequent deprives an owner of any one of these incidents it is repugnant to the grant, and void. Thus, in the case of a fee simple absolute, there inhere in such a grant the following: 1. The right to alienate. 2. The right to devise by will. 3. The right, in case the estate is not devised or sold, to have it descend to the heirs. All

these elements are essential to a fee simple absolute, and any condition in the deed or will which deprives the grantee of the fee simple absolute of these essential rights is void, because it violates a rule of property, and it violates a rule of property when it is repugnant to the grant.[46]

162. **The use of land may be restricted in the grant.**—The use to which land may be put may be restricted or limited in the grant. Thus, the fee may be conveyed upon condition that it shall not be used for certain purposes, as, for example, the sale of intoxicating liquors, maintaining a slaughter house, boiler house, soap factory, livery stable, and the like. These restrictions or conditions as to the use are held good if the party who has a right to enforce them has any interest in their enforcement.[47]

The case of Cowell v. Colorado Springs Co.[48] grew out of a grant to Colorado Springs Co., there being a restriction in the deed that no building should be erected upon the premises for the sale of intoxicating liquors. This condition was violated, and the heirs of the grantor brought suit in ejectment to obtain possession of the premises. The Supreme Court held that the condition was a good one, the violation of which terminated the estate.

In putting a condition of this kind in a deed, it is well to couple it with a right of re-entry by the grantor or his heirs upon the breach of the condition.

[46] Co. Lit. 223a; In re Macleay, 20 L. R. Eq. 186 (Eng.); Venice v. Woodruff, 62 N. Y. 462.

[47] Cowell v. Colorado Springs Co., 100 U. S. 55, LEADING ILLUSTRATIVE CASES; Plumb v. Tubbs, 41 N. Y. 442; Linzee v. Mixer, 101 Mass. 512.

[48] 100 U. S. 55.

The reason for this is, that a violation of the condition does not terminate the estate, but simply gives a right to bring an action for breach of covenant, or breach of condition. Statutes in some states have limited the possible duration of such restrictions.

163. **Same subject—Where condition is of no value to grantor.**—It has been held in this class of cases that where the fulfillment of the condition is no longer of any value to the grantor, when he is no longer interested in its performance, the violation of the condition will not work a forfeiture.[49] In the case of Abraham v. Stewart,[50] for example, it appeared that a person had platted certain lands and had sold all the lots, but in each deed he put the proviso that no saloon should be erected upon the premises. After he had sold all the lots a saloon was built upon one of the lots. The court held that this was a good condition so long as the keeping of the condition was a benefit to the grantor or his heirs, but since the grantor had sold all the lots, he was no longer interested in the performance of the condition, and therefore could not bring an action to recover the lot. But this rule does not preclude the bringing an action for the breach of the condition by some one other than the grantor, as by one of the several grantees, where the deeds are properly drawn, and the condition is made to be in favor of the several grantees. In such a case a bill in equity may be filed by the grantees to enforce the condition.

[49] Abraham v. Stewart, 83 Mich. 7, 46 N. W. 1030; Cowell v. Colorado Springs Co., 100 U. S. 55, LEADING ILLUSTRATIVE CASES.

[50] See Note 49.

A violation of the condition does not of itself terminate the estate,[51] but entry is required.

164. **Assignment of possibility of entry.**—The right or possibility of reversion which belongs to the grantor of an estate on condition subsequent cannot be legally conveyed by deed to a third party before entry for a breach.[52] This ancient doctrine had its origin in the early statutes against maintenance and champerty in England which were designed to prevent the trading in and exploitation of rights of action. At common law the right of entry for breach of a condition was not assignable as the right was strictly personal. But even in states which hold strictly to the non-assignability of the right of entry after a fee whether before or after breach, an assignment by one heir to a co-heir is valid, as such an assignment is not maintenance, and the common law reason as to personal representation is also satisfied. As the right of entry is indivisible the plaintiff is clearly entitled to enforce the right as to the whole of the property.[53]

165. **Effect of assignment.**—The principle that a mere possibility of entry into land is not a subject of grant is woven into the texture of our law and fully recognized and adopted. The result of this principle is that if the grantor does purport to grant away his possibility of re-entry before condition broken this extinguishes the condition. The original maker of the condition cannot enforce it after he

[51] 4 Kent, Commentaries, p. 127.

[52] Co. Lit. 214; Warner v. Bennett, 31 Conn. 468.

[53] Southwick v. New York Christian Missionary Society, 135 N. Y. Suppl. 392, 151 N. Y. App. Div. 116; Fowler v. Coates, 201 N. Y. 257, 94 N. E. 997.

has parted with his right of reverter nor can his grantee take advantage of the breach because the right was not assignable. This is so even though the person to whom the possibility of reverter is granted is the son and heir of the original grantor. The grantor cannot set up the invalidity of his own deed to show that the right was still in the grantor and therefore passed to his heir, nor can the grantee rely on its validity. Both being participators in an unlawful transaction neither can avail himself of it to establish a title in a court of law.[54]

166. **Conveyance of right of entry after condition broken.**—The grantor, after a condition broken, has a present vested interest of the nature of a reversion which he may at any time convey or release and which descends to his heirs. The breach of condition converts the interest from a mere possibility to a vested right.

167. **License to break a condition—The rule in Dumpor's Case.**—There is an ancient rule of law called the rule in Dumpor's Case[55] to the effect that where a license is given to break a condition once, that abolishes the condition for all time. The rule is very troublesome and has been in part abolished in England, and should be abolished in this country. A good example is a case where A lets to B on a long term on condition B shall not build wooden houses. Then the lessor allows the lessee to put up one wooden building, and the question under the rule in Dumpor's Case at once arises whether that allows

[54] Rice v. Boston & Worcester R. Corp., 12 Allen 141 (Mass.).
[55] 4 Co. 119b (Eng.).

him to put up many such buildings. It may be said that the rule should be limited to cases of assignment and does not apply to cases like this. A license expressly stated to be no waiver of future breaches was held to be valid to accomplish its object, and it was decided that the condition was not broken in a recent Illinois case.[56]

The rule in Dumpor's Case, however, does not apply to a waiver, so that after successive breaches with the knowledge of the lessor but without his express license he may still enter for the breach.

168. **Effect of a breach of the condition.**—In the case of a breach of the condition, where the grantor has reserved the right to re-enter, upon re-entering he takes the estate as of the time he granted it. That is, the testator takes the same estate back which he granted, and it is relieved of the dower interest or any estate by curtesy or other estate which could otherwise attach to it. But if an estate upon conditional limitation is given to A, and he marries and has no children who can inherit, that is, dies without issue, does his widow have dower? The estate which he had in the land terminates upon his dying without issue, yet the courts hold in such a case, that the dower interest will attach to the estate, because it was an estate in fee, and having attached to such an estate, it was not destroyed when the estate terminated, as in the case of a condition.

169. **Enforcing breach of condition.**—A breach of a condition can only be enforced at the election

[56] Kew v. Trainor, 150 Ill. 150, 37 N. E. 223.

of one who has the right to enforce it. The only method of taking advantage of a breach of condition was by an entry, as it was thought that just as solemn an act was necessary to defeat an estate as to create one. And when an entry upon condition had been made it had the effect of leaving the estate in the same condition as if the original grant had never been made. Advantage may be taken of a breach of condition although no injury accrues to the grantor. And it is no objection to an entry that the grantor might resort to an action. The right of entry for breach of condition may be waived and the waiver may be by act or by an expressed agreement, although a mere silent acquiescence in a breach will commonly not amount to a waiver.

170. **Equitable relief against breach.**—Equity will sometimes intervene to protect against a forfeiture in cases where the failure to perform the condition is the result of an accident and the injury can be estimated in damages which can be measured by the court, and where the grantor can be secured, as in cases where the condition is for the payment of money at a particular time and the delay can be compensated for by payment of interest. Equity will not, however, protect against the consequences of a willful act, or interfere where the court has no good rule of measuring damages, as for failure to repair or neglecting to insure. It can almost be laid down as a general proposition that the courts will not protect tenants against the consequences of a breach of condition unless the condition consists in the payment of money.

CHAPTER XVII.

USES.

171. **Origin of uses.**—Suppose land is conveyed by A to B on an understanding that he will allow C to use the premises. Here B is the legal owner and C has no right at common law, but has only the use. This is a simple example of a use which later developed into our modern system of trusts.

On the passing of the Statutes of Mortmain,[57] which forbade the accumulation of lands in the hands of religious orders, it became customary to make conveyances to one person for the use of another, or for the use of a corporation. This practice avoided the Statutes of Mortmain and became so common that the courts of chancery contrived a process called a subpoena, compelling one who held the legal title to carry out the terms of his title by executing the use in favor of the cestui que use, or beneficiary. This system of uses was resorted to during the civil wars of the York and Lancaster families to aid family settlements and to prevent the forfeiture of lands for treason. In this way a complicated system of conveyances became a common form and all land had two owners, titles, or estates —the feoffee to uses, who was the legal owner and yet had no beneficial interest in the property, and the cestui que use who had the whole beneficiary

[57] One of the later statutes is 9 George II, c. 26.

interest without the legal title. Great inconveniences and frauds arose from this system which are summed up by an old writer as follows: "By this course of putting lands into uses there were many inconveniences, as this use, which grew first from a reasonable cause, namely, to give men the power and liberty to dispose of their own, was turned to deceive many of their just and reasonable rights, as, namely, a man that had cause to sue for his land knew not against whom to bring his action nor who was owner of it. The wife was defrauded of her thirds, the husband of being tenant by curtesy, the lord of his wardship, relief, heriot, and escheat; the creditor of his extent for debt; the poor tenant of his lease; for these rights and duties were given by law from him that was owner of the land, and none other, which was now the feoffee of the trust."[58]

172. **Same subject—Consideration for grant.**—Uses are thus explained by a leading authority: "Previously to the reign of Henry VIII, when the Statute of Uses[59] was passed, a simple gift of lands to a person and his heirs, accompanied by livery of seisin, was all that was necessary to convey to that person an estate in fee simple in the lands. The courts of law did not deem any consideration necessary, but if a man voluntarily gave lands to another and put him in possession of them, they held the gift to be complete and irrevocable; just as a gift of money or goods, made without any considera-

[58] Bacon's Abridgment, Perry, Vol. I, p. 4. The origin of uses and trusts is considered in 21 Harvard Law Review 261. See, also, Bacon on Uses, 22, LEADING ILLUSTRATIVE CASES.

[59] 27 Henry VIII, c. 10.

tion, is, and ever has been, quite beyond the power of the giver to retract, if accompanied by delivery of possession. In law, therefore, the person to whom a gift of lands was made, and seisin delivered, was considered, thenceforth, to be the true owner of the lands. In equity, however, this was not always the case, for the court of chancery, administering equity, held that the mere delivery of the possession or seisin by one person to another was not at all conclusive of the right of the feoffee to enjoy the lands of which he was enfeoffed. Equity was unable to take from him the title which he possessed, and could always assert in the courts of law; but equity could and did compel him to make use of that legal title, for the benefit of any other person who might have a more righteous claim to the beneficial enjoyment."

"Thus, if a feoffment was made of lands to one person for the benefit or to the use of another, such person was bound in conscience to hold the lands to the use or for the benefit of the other accordingly; so that while the title of the person enfeoffed was good in a court of law, yet he derived no benefit from the gift, for the court of chancery obliged him to hold entirely for the use of the other for whose benefit the gift was made. This device was introduced into England about the close of the reign of Edward III by the foreign ecclesiastics, who contrived by means of it to evade the Statutes of Mortmain by which lands were prohibited from being given for religious purposes; for they obtained grants to persons to the use of the religious houses,

which grants the clerical chancellors of those days held to be binding. In process of time, such feoffments to one person to the use of another became very common, for the court of chancery allowed the use of lands to be disposed of in a variety of ways, amongst others by will, in which a disposition could not then be made of the lands themselves."

"Sometimes persons made feoffments of lands to others to the use of themselves, the feoffors, and when a person made a feoffment to a stranger, without any consideration being given, and without any declaration being made for whose use the feoffment should be, it was considered in chancery that it must have been meant by the feoffor to be for his own use. So that though the feoffee became in law absolutely seized of the lands, yet in equity he was held to be seized of them to the use of the feoffor. The court of chancery paid no regard to that implied consideration which the law affixed to every deed on account of its solemnity, but looked only to what actually passed between the parties; so that a feoffment accompanied by a deed, if no consideration actually passed, was held to be made to the use of the feoffor, just as a feoffment by mere parol or word of mouth. If, however, there was any, even the smallest, consideration given by the feoffee, such as five shillings, the presumption that the feoffment was for the use of the feoffor was rebutted, and the feoffee was held entitled to his own use."[60]

"Transactions of this kind became in time so frequent that most of the lands in the kingdom were

[60] This is the origin of the statement of consideration in modern deeds.

conveyed to uses 'to the utter subversion of the ancient laws of this realm.'"[61]

173. **Uses as an attack on the feudal system.**—The practice of conveying lands to uses was not ancient and in fact one of the principal purposes of the device seems to have been to avoid the hardships of the feudal system. The introduction of uses was in fact one of the most important circumstances in the history of the decline of the feud. Under the practice of uses there was never a vacancy in a legal estate and there was no point of connection between the tenant and the lord. It was customary to make a feoffment to uses to many persons as feoffees and when their number was reduced so that only one or two were left, it was usual to make a new feoffment to other feoffees on the same uses. In the meantime the beneficial interest in the land was being transferred by the cestui que use at his will. The feudal services and fruits incident to descent practically never accrued to the lord where the land was held to uses and the fruits of tenure incident to purchase became seldom due. When we consider that when land was sold the lord was entitled only to relief, which was a comparatively trifling charge, while when the land passed by death the lord was entitled to the grand fruits of military tenure, wardship, and marriage, it is clear how great a fraud was practiced on the lords by the introduction of these uses.

174. **The operation of the Statute of Uses.**—Parliament passed many statutes to obviate the evils

[61] Williams, Real Property (6th ed.), Vol. I, pp. 155-157.

of uses. At last the famous Statute of Uses was passed in the reign of Henry VIII, which converted the beneficial use into legal ownership. The statute provides that where any person or persons stands seized of any lands or hereditaments to the use, confidence, or trust of any other person, the persons that have any such use, confidence, or trust for their benefit shall be deemed in lawful seisin and possession of the lands or hereditaments. This is a remarkable instance of the unlimited power of Parliament in transferring a legal estate from one man to another without compensation; it enacts, in fact, that a gift to A shall not, under some circumstances, go to A at all. There were four cases, however, still left to which the statute did not apply.

First, where A conveyed to B to the use of C in trust for D the statute would "execute" the use by transferring the legal estate to C, but without affecting the trust for D. One effect of the statute was to deprive the court of chancery of most of its business for a time and as there was at that time great rivalry and jealousy between the common law courts and the chancery courts, the chancery courts would frequently uphold any trust raised in this way as it gave them jurisdiction over the subject matter of all such litigation. In this case, for example, D had no remedy at law and was obliged to go into chancery to force C to perform the trust.

In the second place, if A conveyed land to B for a term of years for the use of C the use was not executed in C, as the statute only applied to legal titles in seisin and no one can be seized of a term of

years, and so in this case also C would be obliged to go into equity to enforce his rights.

In the third place, the statute did not execute the use if the first taker had any active duties to perform in regard to the estate, as to hold it for a fixed period or to improve or take care of it.

In the fourth place, the statute did not apply to personal property.

The chancery court was quick to seize upon these four cases which the statute failed to cover, and enforced the rights of the beneficiaries by subpoena.

The effect of the Statute of Uses was tremendous, as it placed in the common law courts interests which before that could only be adjudicated in equity. The two branches of the courts were then bitter rivals.

175. **Lease and release—Bargain and sale.**—The old common law required an actual entry in order to pass title. It required also livery of seisin. But a tenant under a written lease was in a different position from a mere stranger for he was then capable of acquiring possession without any formal livery of seisin by a transfer or conveyance from the landlord of all the landlord's estate and premises. And there was not the necessity of livery of seisin to him as there would have been to a mere stranger. And in fact livery of seisin would have been improper, as he was already in possession. The proper method of conveying the landlord's interest to the tenant was by a deed called a release. In this way arose the custom of transferring property by lease and release without the necessity of actual entry by the lessee under the Statute of Uses, which made it

possible to effect this. Before the Statute of Uses the court of chancery had made a rule that where a contract for the purchase of an estate was executed and the purchase money paid but no deed actually executed and delivered that the estate ought properly to belong to the person who paid the money and therefore that the seller was in equity immediately seized "to the use" of the purchaser. The Statute of Uses[62] executed the use by providing that when any person is seized of lands to the use of another, the person who has the use shall be considered in lawful possession and seisin of the property. It therefore came to pass that the seisin was transferred from one person to another by a mere bargain and sale, that is, by a contract for sale without the necessity of a deed or a feoffment and without the employment of the word "heirs," as it was presumed that the purchase money was paid for an estate in fee. The result of this was so bad that Parliament immediately after was obliged to enact, by a statute called the Statute of Enrollment,[63] that every bargain and sale of an estate of inheritance or freehold should be made by deed indented and enrolled. The loop-hole in this statute was speedily discovered in that it only covered estates of inheritance of freeholds and made no mention of estates for years. Conveyancers soon began the practice of making a lease for a year to the buyer and then executing a release of his interest. This is the modern practice of lease and re-

[62] 27 Henry VIII, c. 10.
[63] 27 Henry VIII, c. 16.

lease which was the common method of conveying in England for two centuries.

176. **Application of statute to a use on a use.**—As the statute only applied to cases where a person was seized of lands the doctrine arose that a use could not be executed upon a use. For example, if A granted land to B for the use of C for the use of D, B was seized of the lands to the use of C and the statute immediately executed the use in C and gave him the legal title. But C was not seized of lands to the use of D, but only of a "use," therefore, the use in C for D remained unexecuted as it was before the statute. So if lands were granted to A and his heirs for the use of C in fee or for life with remainders over, or to B and his heirs in trust to permit C and D to receive the rents, in all these cases the statute executes the first use only in B and his heirs and the legal estate vests in him as trustee for the persons interested.

177. **When trusts survive the statute.**—A trust whereby the trustee has to take some action was never executed by the statute, but if the trust is simply to permit and suffer A to occupy the estate or to receive the rents, the legal estate is executed in A by the statute. But where a trust is to pay unto or to permit and suffer a person to receive the rents and both expressions are used the intention of the donor will govern. So if the grant is to permit A to receive the net rents or the clear rents, the use is not executed, as the words "net" and "clear" imply that the trustees are themselves to pay all expenses and turn over the balance only to the bene-

ficiaries. The mere charge of debts and legacies on real estate will not, however, vest the estate in the trustees unless there is some direction to them to raise money and pay them, or unless there is some other direction or implication that they must be active in the execution of the trust. Where several trusts are created by the same deed, some of which would be executed by the statute and some of which require active steps by the trustees, the use is not executed and the trustees will hold the legal title. So in any case where an estate is given to trustees to preserve contingent remainders the trustees hold the legal title.

178. **Effect of the statute on devises.**—Another effect of the passing of the Statute of Uses was to abolish for a time all wills of uses until the Statute of Wills restored them, as a devise of a fee could not at that time be made, and the Statute of Uses established the fee in the cestui que use or beneficiary.

179. **Statute of Uses in the United States.**—The Statute of Uses is in force in most of our states,[64] as it was passed before the colonists left England, and it became a part of the law of all the colonies, especially as the system of equity jurisdiction in the colonies grew very slowly and most of them had no equity courts up to the time of the Revolution. The statute has been expressly passed in many states, and it is considered applicable in any state where there is no statute covering the question.

[64] Jordan v. Phillips & Crew Co., 126 Ala. 561, 29 So. 831, LEADING ILLUSTRATIVE CASES; Leake, Digest of Land Law, 112, 113, LEADING ILLUSTRATIVE CASES.

CHAPTER XVIII.

EQUITABLE CONVERSION.

180. **Nature and origin of doctrine.**—There is a doctrine in equity that where land is held by a testator and is directed by his will to be sold this land is to be regarded in equity as personal property and is to be so divided. The doctrine is of importance in England where the heir to land may be a different person from the next of kin, while it is not important in America where the heir to land is also the next of kin entitled to personal property.

The origin of the doctrine is the maxim that equity looks upon that as done which ought to have been done. The rule has been stated as follows: "In equity no rule is of more frequent occurrence in practice than that by which land directed to be converted into money or money directed to be converted into land is to be treated as that species of property into which the one or the other is so directed to be converted."

Conversion is a question of the intention of the grantor or testator which is determined from the provisions of the grant or will. The intention must be clear and explicit and the conversion must be obligatory and not merely in the discretion of the trustee. The intention to sell may be shown by a positive direction or by a necessity to sell in order

to carry out the provisions of the will; or the will may be so framed as to show that the real and personal property is to be merged to create a fund and to leave the fund as money.[65]

181. **When conversion takes place.**—A mere power of sale will not work a conversion,[66] but of course an actual sale under a power will accomplish that result. On the other hand a discretion given the trustee as to the time or manner of sale when there is a clear duty to sell will not prevent a conversion, and the fact that the sale is directed to be made at some future date will not prevent a conversion. Where the sale depends on the request or consent of the beneficiaries there is no conversion until the request is made or consent is given. While a direction to sell on conditional terms is insufficient to create a conversion, the conversion may take place although the beneficiary has an option to take land instead of proceeds. Marriage settlements may effect a conversion into land, or the contract for the sale of the land, or even the giving of an option to purchase land may work its conversion. When the option is exercised it relates back to the date of the contract.

The doctrine of conversion applies also to conveyances of land to trustees on trust to sell and hold the proceeds for various beneficiaries. The most important application of this doctrine in this country is to partnership lands which are treated as per-

[65] Curteis v. Wormald, 10 Ch. Div. 172 (Eng.), LEADING ILLUSTRATIVE CASES.

[66] Swisher v. Swisher, 137 N. W. 1076 (Iowa), LEADING ILLUSTRATIVE CASES.

sonal property so far as necessary for the payment of partnership debts and the settling of partnership affairs. As soon, however, as the partnership is settled the surplus real estate, if any, regains its character as real estate.

Conversion may also take place where a sale has been ordered by the court or by eminent domain proceedings.

An absolute order of the court for the sale of land will be enough to cause an equitable conversion. So where such an order was given and the owner died after the order was issued, but before the sale was actually made, his next of kin were entitled to the surplus after disposing of the incumbrances.[67]

182. **At what instant conversion takes place.**—There is some conflict of authority as to the time when a conversion under a direction to sell takes place. By the weight of authority when the sale is not to be effected until a future time which is certain to arrive, such as a fixed date or the termination of a life estate, conversion takes place at the testator's death.[68] Some cases, however, take the view that the conversion takes place at the time appointed for the sale.[69]

183. **Conversion of partnership property.**—In the United States the rule is that only so much of the real estate shall be sold as is necessary to pay the partnership liabilities.[70] This may result in the partner having no specific interest in firm real estate

[67] In re Stinson, 1910, 1 Irish 13.
[68] Lash v. Lash, 209 Ill. 595, 70 N. E. 1049.
[69] Williams v. Lobban, 206 Mo. 399, 104 S. W. 58.
[70] Shearer v. Shearer, 98 Mass. 107.

until it is settled that the real estate is not necessary for settling up the partnership. Or the rule may, on the other hand, result in this, that the land remains the land of partners as individuals, but may be sold so far as necessary to settle partnership affairs. Either view will justify the decision in a very recent case where all the firm accounts were settled without disposing of the land and the court held that the heirs of the deceased partner might file a bill for partition of the land.[71]

184. **Effect of option.**—Where A leases land to B with an option of purchase and A dies intestate and B tenders the price to the administrator of A, this is a proper tender, as the heirs of A have no rights in the money. The administrator's right to the purchase price is personal property, although it may be suggested the administrator has no claim, as he has no cause of action until the option is accepted. The prevailing rule in this country, however, is that the purchase price belongs to the administrator.[72] The doctrine that the acceptance of an option relates back so as to convert the realty into personalty from the time of giving the option has been confined in England to a dispute between claimants under the vendor, although there is authority in this country to the contrary.[73]

185. **Reconversion.**—The doctrine of reconversion arises from the equitable doctrine that equity will not compel a thing to be done against the wishes

[71] Schleissner v. Goldsticker, 120 N. Y. Suppl. 333, 135 A. D. 435.

[72] Newport Water Works v. Sisson, 18 R. I. 411, 28 Atl. 336.

[73] Williams v. Lilley, 67 Conn. 50, 34 Atl. 765; People's Street Railway Co. v. Spencer, 156 Pa. St. 85, 27 Atl. 113.

of all persons interested. So where the whole beneficial interest in land directed to be sold belongs to the person or persons for whose use it is given, equity will not compel the trustee to execute the trust against the wishes of the beneficiary, but will permit him to take the land if he elect to do so before the conversion has actually been made. This doctrine cannot apply unless the whole beneficial interest is in the land sought to be sold. Reconversion is that "notional or imaginary process by which a prior constructive conversion is annulled and taken away and the converted property restored in contemplation of equity to its original actual quality."[74]

[74] Snell, Principles of Equity, p. 160.

CHAPTER XIX.

REMAINDERS AND REVERSIONS.

186. **Meaning of a reversion.**—A reversion is that estate which the grantor has after the particular estate which has been granted to another terminates. In other words, a reversion is that portion of the fee simple which remains in the grantor after the termination of a particular estate which has been carved out of it. If, for instance, the person having the fee creates a life estate, the life tenant is vested (clothed) with the estate, and under the feudal system he was given the actual possession, and was regarded as seized of the freehold during his life. The grantor was vested with the reversion; that is, he had a fee simple estate after the termination of the life estate. The whole estate had not been granted, and that which remained in the grantor to be re-enjoyed after the termination of the estate granted was called a reversion. The legal right of the grantor in the estate is as large before the intermediate estate terminates as after, but the reversion applies to the use of the land, of which he is deprived until the life estate terminates.[75] The life estate is called the particular estate.

"If a tenant in fee simple should grant to another person a lease for a term of years, or for life, or even

[75] Co. Lit. 22b, 142b; Plowden 151, 195 (Eng.).

if he should grant an estate tail, it is evident that he will not thereby dispose of all his interest; for in each case, his grantee has a less estate than himself. Accordingly, on the expiration of the term of years, or on the decease of the tenant for life, or on the demise of the donee in tail without having barred his estate tail and without issue, the remaining interest of the tenant in fee will revert to himself or his heirs, and he or his heirs will again become tenant in fee simple in possession. The smaller estate which he has so granted is called, during its continuance, the particular estate, being only a part or particula, of the estate in fee. And during the continuance of such particular estate, the interest of the tenant in fee simple, which still remains undisposed of—that is, his present estate, in virtue of which he is to have again the possession at some future time—is called his reversion."[76] The Statute De Donis secured to the grantor of an estate tail a reversion upon the death of the tenant in tail without heirs, until common recoveries came into vogue.[77]

187. **Meaning of a remainder.**—An estate in fee simple is an entity which can be divided, however, into any conceivable number of lesser estates. A remainder is an estate or interest in lands to take effect in possession or enjoyment immediately upon the determination of a prior estate which is created at the same time by the same act or instrument and upon which the first mentioned interest is made to

[76] Williams, Real Property (6th ed.), p. 241.
[77] Co. Lit. 22a.

depend. The prior estate is called the particular estate and the interests of the two estates are entirely distinct.

"If at the same time with the grant of the particular estate he (the grantor) should also dispose of his remaining interest or reversion, or any part thereof, to some other person, it then changes its name, and is called, not a reversion, but a remainder. Thus, if a grant be made by A, a tenant in fee simple, to B for life, and after his decease to C and his heirs, the whole fee simple of A will be disposed of, and C's interest will be termed a remainder, expectant on the decease of B. A remainder, therefore, always has its origin in express grant; a reversion merely arises incidentally, in consequence of the grant of the particular estate. It is created simply by the law, whilst a remainder springs from the act of the parties."[78]

188. **Remainders and reversions distinguished.**— The distinction between a remainder and a reversion is that in the case of a remainder and a particular estate they both derive their estates from the same source and both hold their estates of the same chief lord. It consequently follows that no rent service is incident to a remainder, as is usual to a reversion. For rent service is an incident of tenure and in this case no tenure exists. On the other hand a reversion necessarily arises from the grant of the particular estate, being simply that part of the estate of the grantor which remains undisposed of; while

[78] Williams, Real Property (6th ed.), p. 242; 2 Blackstone, Commentaries, p. 163.

the remainder is always itself created by an express grant.[79]

189. **Future estates at common law.**—Reversions should be considered under three heads. First, at the common law; second, under the Statute of Uses; third, under modern legislation. At common law there were remainders and reversions and other future interests. At common law a rent might be created to begin at a future time and was conveyed by deed, so in general an estate by grant at common law may begin in the future; but an estate by livery may not. An easement for example might be created to begin in the future. Furthermore, a man may create a remainder to himself, but he cannot create a reversion to himself, as that is something that the law gives to him. A remainder is always created at the same time as the particular estate, so where a grant is made to A for life, but if he is married, then to B and his heirs, that is void as an estate not known at the common law. This laps over and it is a principle of the common law that a remainder must not cut short the previous estate. This is bad. So an estate to A for life and one year after his death to B and his heirs, creates a gap and is bad. The common law thought of estates as in a series and the remainders must not lap over the previous estate on the one hand and must not leave a gap on the other. Either result was abhorrent to the courts of that time.

The third situation is of a grant to A until he is married and then to B and his heirs. That is a valid

[79] Akers v. Clark, 184 Ill. 136, 56 N. E. 296, LEADING ILLUSTRATIVE CASES.

remainder, as it does not cut short the prior estate. It is a life estate in A until he marries.

Another situation which arises is of an estate to A for life, then to B for life, then to C in fee. There A has a particular estate, and B and C have remainders. In case an estate was created for A for life, then to B for life, to C in tail, to D in fee and to E for life; A has a particular estate; B, C, and D have remainders and E has nothing. If there is a limitation after a fee it can only be created by what is called an executory devise and cannot be a contingent remainder. There is a little more latitude in the creation of estates by will, as we shall see, through the medium of executory devises, treated in Chapter XXI of this article.

190. **Estates at common law could not begin at a future time.**—A fundamental doctrine at the common law is that no independent estate of freehold can be created to commence in the future. As such estates could only be created by livery of seisin and there could be but one seisin, the grantor could not in the nature of things part with his seisin and still retain it for any period. The early common law as to the creation of future interests was, however, made of little moment on account of the Statute of Uses, as a result of which estates may begin in the future. A right in another's land may be created to begin in the future, but it may not be transferred to begin in the future. An easement is regarded as not one of the usual estates in land but is the creation of something new and hence the creation and the transfer of an easement are different.

191. **How a reversion or remainder might be conveyed at common law.**—If a tenant in fee simple made a lease of his land for a term of years, his reversion, in law, is but a continuance of his former estate, the tenant by lease being regarded as a mere bailiff for the owner, and the grantor and his heirs have the right to dispose of their interest the same as before leasing. But if the owner in fee grants a life estate, or freehold estate, by the rules of the common law the life tenant takes the seisin, or is invested with the property, and is presumed as invested with the estate in fee simple during his life, that is, his life estate carries with it the freehold or feudal seisin, so that the owner in fee simple could not make a feoffment (conveyance by livery of seisin) since his reversion is strictly incorporeal during the life of the tenant for life. So the owner having no seisin, could give none, and to convey this incorporeal reversion the grantor, or owner of the fee simple, had to make a deed of grant.[80]

At common law a feoffment or conveyance of real property in freehold was effected by livery of seisin.[81] And that seisin meant the putting the tenant in actual possession of the land, and announcing in the presence of witnesses, what estate he took, and for whom he held in reversion or remainder. Under the old feudal system, when the lord granted an estate to A for life, and put him in possession by livery of seisin, all other tenants were put out of possession, and it was then announced to all of the witnesses

[80] Co. Lit. 153a, 366b; Shep. Touch 230; Williams, Real Property (6th ed.), pp. 242, 243.

[81] Treated in Chap. VII.

present, that A was given possession for himself for life, of the life estate, and possession for B in remainder, if such was the case, or possession for the lord as reversioner, if there was no remainder granted to any one.[82]

192. **When the seisin of any subsequent estate must take effect.**—The seisin of any subsequent estate must take effect immediately upon the termination of the precedent estate. Under the old feudal system there must be someone who had the immediate right to the seisin. The seisin could not be in abeyance, as we have seen in § 68 of this article. The exigencies of the feudal system required that the immediate seisin of the freehold should never be in abeyance, since upon the seisin of the land by tenants who held by reason of military service or rent, and allegiance to the lord paramount, depended the whole fabric of the feudal government. If the estate was in abeyance, and no one in possession, there would be no one to support the king. The right of a person to an estate depended upon his right to take immediate possession of it upon the termination of the preceding estate.[83]

As a result of the principle just stated, future estates could not be granted in fee, as the tenant by the future fee could not be put in possession of the title to the land without livery of seisin, which was in another. Title never passed until possession was given; the title and possession being regarded as inseparable. Hence, a grant to A for life, re-

[82] Co. Lit. 48, 49, 50.
[83] Co. Lit. 342b, Butler's note.

mainder to B in fee, is good; but a grant to A for life, remainder after one year to B in fee, is void at the common law, the reason being that the moment the life estate is ended there must be someone in being, with the right to take the immediate seisin, and if the person to whom you give the fee is not able to take possession of the fee the moment the life estate ceases, the grant is void as incompatible with the rule of the common law.[84] So that it follows from this principle, that a grant of a freehold to take effect in the future can never be made.[85]

193. **Fee simple divided into successive estates.** —The legal conception of a fee simple estate in lands is of one that may be divided into many parts, or estates, if each of such estates is supported by, or rests upon, its predecessor and is ready to come into being the moment the other is determined. Thus it is permissible to grant a life estate to A, remainder to B for life, remainder to C for life, remainder to D in fee, since each estate is supported by the preceding estate, and taking them altogether you have an entire fee simple. "So long as a regular order is thus laid down, in which the possession of the lands may devolve, it matters not how many kinds of estates are granted, or on how many persons the same estate is bestowed. Thus a grant may be made at once to fifty different people separately for their lives. In such a case the grantee for life who is first to have the possession is the particular tenant to whom, on a feoffment, seisin would be delivered, and

[84] Colthirst v. Bejushin, 1 Plowden 20 (Eng.).

[85] Co. Lit. 217a; In re Banes, 5 Coke 94b, Berwick's Case (9 Co. 91a, 93b) (Eng.).

all the rest are remaindermen; whilst the reversion in fee simple, expectant on the decease of them all, remains with the grantor. The second grantee for life has a remainder expectant on the decease of the first, and will be entitled to possession on the determination of the estate of the first, either by his decease or forfeiture, or otherwise. The third grantee must wait until the estate of both the first and second shall have determined; and so of the rest."[86]

194. **Necessity of a particular estate of freehold.**—It is essential to a remainder that it take effect on the determination of the particular estate and consequently no remainder can be created without a particular estate to support it and this must be an estate of freehold. At common law, as it is necessary that the seisin always be in someone, therefore the particular estate must be a freehold in order to support the remainder, although this has been changed in some states now by statute. It follows from the rule that the particular estate and the remainder must constitute a continuous ownership and be parts of the same inheritance, that if the particular estate is void, it will leave the remainder without support and thus failing altogether. For example, where a particular estate is defeated by an entry by the grantor for condition broken before the remainderman comes into possession the remainder fails altogether.

195. **Vested and contingent remainders.**—A remainder may be either vested or contingent. A

[86] Williams, Real Property (6th ed.), p. 251. See, also, 2 Blackstone, Commentaries, pp. 167, 171.

vested remainder is where it is certain at any time who is to take the estate provided the particular estate determines at once; while a contingent remainder depends upon the happening of some event or contingency before the estate limited as a remainder shall ever take effect at all.[87] When a remainder is granted to an ascertained and definite person it is called a vested remainder; thus, if an estate is granted to A for life, remainder to B in fee, B is given a vested remainder. While if the remainder is limited to take effect upon the happening of an uncertain event, or is granted to a person whose identity is uncertain, it is called, so long as this uncertainty exists, a contingent remainder. As soon as the uncertain event happens, or the identity of the person becomes certain, the contingent remainder becomes a vested remainder. A contingent remainder, because of the fact that it might never vest, was long regarded as illegal by the early common law. But during the reign of Henry VI, it was adjudged that such a remainder was valid so long as the particular estate supporting it existed.[88]

A remainder is said to be vested in a person when he and his heirs have a right to the immediate possession of the estate upon the termination of the particular estate. And a remainder is nevertheless a vested one, though it may never be enjoyed by reason of the fact that the particular estate may outlast the remainder, as where the remainder is a

[87] Golladay v. Knock, 235 Ill. 412, 85 N. E. 649, LEADING ILLUSTRATIVE CASES.

[88] Year Book, 9 Henry VI, 24a; Williams, Real Property (6th ed.), p. 264.

life estate supported by another life estate. It is the uncertainty as to the estate vesting in interest, that characterizes a contingent remainder, and not the vesting of the possession.

If an estate is given to A for life, remainder to the heirs of B, and B is alive, the remainder is not vested, as although B may have several children, they are only heirs expectant.[89] According to the common law, a person has no heirs while living, hence in the example given, if B dies before A, the heirs mentioned are determined and vested with the remainder in fee, but if A dies first there are no heirs of B till his death, and the estate lapses.[90]

196. **Construction as to vested or contingent remainder.**—Whether a remainder is vested or contingent depends upon the language creating the remainder. If in the creation of the remainder the conditional element is incorporated and made a part of the description of the remainder, it is contingent. If, however, after words giving a vested remainder, a clause is added divesting it upon certain conditions, it is still a vested remainder, though liable to be divested. Thus, for example, a devise to A for life, remainder to his children, but if any child dies in the lifetime of A, his share to go to the surviving brothers and sisters, creates a vested remainder, though the vested remainder of each child is liable to be defeated by his death. But if the devise is to

[89] Co. Lit. 342, 378; Williams, Real Property (6th ed.), pp. 265, 266.

[90] Williams, Real Property (6th ed.), p. 264. There is a discussion of the disagreement as to the classification of vested and contingent remainders between Professor A. M. Kales and Professor John C. Gray, in 20 Harvard Law Review 243.

A, remainder to the children who survive him, this remainder is not to a single one of the children now in existence, but to the children who survive, and it is uncertain which will survive, so that the remainder is contingent and does not vest until the death of A.[91]

197. **Remainder to right heirs.**—When there is a gift over in a will to the right heirs, it is sometimes difficult to determine whether the right heirs designated are those persons who were his heirs at the time of his death, when the will took effect, or his heirs when the remainder over is ready for distribution, at the death of the first taker. The general rule is, that where a remainder over is given to the heirs of the testator, the testator means the heirs of himself in existence at the time of his death, unless there is something in the will which indicates, beyond a question, that he means the heirs that are in existence at the time the life estate terminates.[92]

In such devises the rule as regards the exclusion of the first taker from sharing in the remainder is, that if it appears from the will that the estate given the first taker is all the estate that the testator intended he should have, then the estate goes to those persons who are the right heirs of the testator at the time of his death, and the first taker, although he may be a right heir at that time, is excluded.[93]

198. **Contingent remainder becoming vested.**—A contingent remainder becomes vested as soon as the

[91] Alverson v. Randall, 13 R. I. 71; Delbert's Appeal, 83 Pa. St. 462.

[92] Kellett v. Shepard, 139 Ill. 433, 28 N. E. 751.

[93] Lasbury v. Newport, 9 Beav. 376 (Eng.); Gittings v. M'Dermott, 2 Myl. & K. 69 (Eng.).

contingency happens on which the remainder depends. So if a grant is made to A with remainder to his children, A having no children at the time, the remainder is contingent, but as soon as he has a child born the remainder becomes vested.

199. **Alteration of interests before testator's death.**—Circumstances before a man's death may change an estate from an executory devise to a contingent remainder or from a contingent remainder to an executory devise.[94] Thus in case of a will giving to A and his heirs, but if he dies without children living at his death, then to B for life and remainder in fee to B's eldest son, and B is unmarried, B has an executory devise, as it follows the fee. But if before the testator's death A died childless B's eldest son has a contingent remainder. So if an estate is given to A for life and remainder to the eldest son of B, who has no son, that is a contingent remainder to B's eldest son. But if A dies before the testator then it is an executory devise, as there is no estate to base it on.

200. **Alteration of interests after the testator's death.**—In the first case given in the preceding section where there was a grant to A and his heirs, but if he dies without children living at his death then to B for life, remainder in fee to B's eldest son, if A dies after the testator B comes into possession, then B's eldest son has a contingent remainder. On the other hand, if we assume the second case given in the preceding section, of an estate to A for life and remainder to the eldest son of B, who has no son, if

[94] See Chaps. XX and XXI.

after the testator's death A dies, B not yet having a child born, the remainder would fail as there is no estate to support it. In short, after the testator's death a contingent remainder cannot turn into an executory devise,[95] although an executory devise can turn into a contingent remainder.

201. **Remainderman may be uncertain during particular estate.**—During the continuance of the particular estate of freehold, the freehold in remainder might be in abeyance, because the seisin of the particular estate was sufficient to satisfy the requirements of the feudal tenure. Consequently the remainder could be limited to take effect upon condition, or to vest in some person to be ascertained thereafter, and the uncertainty as to the happening of the event, or the ascertainment of the person, could continue so long as the particular estate continued; but the remainder must have become certain before or at the termination of the particular estate, or else it would lapse. Therefore, if an estate is given to A, remainder to the heirs of B, and B is alive, this is a good conveyance, so long as the particular estate continues. And if B should die before the tenant for life, thereby giving to his heirs the right to take (as he has no heirs while living) his heirs will take the estate on the death of A; but if B outlives A, then the remainder over is void, because the seisin would be in abeyance, there being no heir to take.

202. **Classes.**—A class is a body of persons described in a deed or will, uncertain in number at the

[95] See note 94.

time of the creation of the class, who take one divisible sum in certain proportionate shares.

A devise to a class is a case where a remainder may be vested although the persons who may take are not ascertained and cannot be until the happening of some future event. In such case the remainder is said to be vested in the class but not in the members of a class. A good example of this is a devise to A for life, remainder to the children of B; if B has children at the testator's death they would take a vested remainder, and if he were to have other children during the life of A before the remainder was to take effect in possession, the devise would open and let in the children born during A's life who will take shares as vested remainders.

203. **Remainders after estates tail.**—After a contingent remainder in fee a vested remainder is bad; hence it may be noted that if estates tail had remained as conditional fees determinable only upon the donee's dying without issue there never could have been at common law a remainder after an estate tail, but since the Statute De Donis turned the estate of a tenant in tail into a life estate it became perfectly possible to limit the remainder after an estate tail.

204. **Remainder vesting on determination of particular estate.**—An early example of the proposition that there must be no gap between the particular estate and the remainder is Archer's Case,[96] decided in 1597, where there was a devise to A for life and afterwards to the next heir male of A and to the

[96] 1 Rep. 67a (Eng.).

heirs male of the body of such heir male. It was held that the remainder to the right heir male of A is good, although he cannot have a right heir male during his life, as it is sufficient that the remainder vests the instant the particular estate determines. It should be explained in this connection that a living person can have no heirs but that the heirs only are determined and come into existence on the death of the ancestor.

205. **Heirs construed heirs of the body.**—Suppose an estate be given to A and his heirs and if he die without heirs, to T; A has a fee simple and there is no reason why the word "heirs" should change its ordinary meaning. On the other hand, if there is an estate to A and his heirs, and if he dies without heirs, to his brother John, that is nonsense literally, as John is his heir, and in order to make sense the courts construe the word "heirs" to mean heirs of the body.

206. **Uncertainty whether remainderman will ever enjoy estate.**—It should be noted that the fact that it may be uncertain whether the remainderman will ever enjoy the estate, does not prevent the remainder being vested if he has a present absolute right to have the estate the instant the prior estate is extinguished. So if an estate is given to A for ten years, remainder to B for life, remainder to C for life, B and C may both die before they become entitled, but both have vested interests, as they have a present right to have the estate when the prior estate closes. In other words, the present capacity of taking effect in possession if the possession were

now to become vacant, and the certainty that the possession will become vacant before the estate limited in the remainder determines, universally distinguishes a vested remainder from one that is contingent. In this sense, therefore, a vested remainder is to all intents and purposes an estate commencing at once, though to be enjoyed in the future.

207. **Rule of vesting.**—A remainder is vested when, so long as it continues, it is ready to take effect as soon as the previous estate concludes. This is a good general rule for determining the difference between vested and contingent remainders. For example, if there is a grant to A for life, remainder to B for life, this is a vested remainder to B, as B so long as he lives is ready to take the estate as soon as A dies. Furthermore, in case of a grant to A for life, remainder to B for life, but if B dies unmarried, then to C and his heirs, this is a vested remainder in C and his heirs.

There is a qualification of this rule to the effect that an estate is never vested until it is determined who will take it. As for example, in case of a grant to A for life and remainder to his surviving children, this is a contingent remainder, as it cannot be known until the death of A who will take the estate.

CHAPTER XX.

CONTINGENT REMAINDERS.

208. **Origin and classification.**—Contingent remainders were not recognized in England until the middle of the fifteenth century when the first case appears sustaining one. Contingent remainders have been divided into four classes. The first class is where the particular estate is subject to be determined by the happening of some contingent event and the remainder is made to depend on this event. An old example of this is: A feoffment to the use of A until B returns from Rome and upon his return over to C; here the remainder to C is contingent because the event upon which it depends may never happen.

The second class is where the remainder depends on a contingency whether a certain collateral event shall happen or not before the particular estate shall have determined. An example of this is where an estate is created to A for life, remainder to B for life and if B dies before A remainder to C for life. Here C has a contingent remainder, as it is uncertain whether he will ever get the property, and his inheritance depends on whether B dies before or after A.

The third class includes instances where the contingency depends on whether an event which is sure

to take place shall happen before the expiration of the particular estate which supports it. For example, take the case of a grant to A for life with remainder after the death of B to C for life. It is certain that all of them will die, but whether B dies before C is wholly uncertain and the remainder to C is contingent.

The fourth class of contingent remainders depends on the uncertainty of the person who is to take, as he is not in being or not ascertained at the time the estate is created. Suppose an estate to A for life with remainder to the oldest son of B who has no son at the time of the grant, with remainder to the heirs of B who are alive. Here there is a contingent remainder to the oldest son of B.

209. **Possibility on a possibility.**—It was laid down by Lord Coke that a double possibility or a possibility upon a possibility would not be sufficient to support a limitation in remainder. For example, a grant to A for life with remainder to a son of B named William, when B had no son, was said to be void, as to make the gift possible it would be necessary that B have a son and call him William. If this was ever really the law in this country it has been changed and such a contingency would now be held good here, though not in England.[97]

210. **Cross remainders.**—The expression cross remainders is used to apply to cases where lands are given in undivided shares to two or more people with such limitations that on the determination of the first estate in any one of the shares the property

[97] See § 256.

goes over to the other grantees. This usually occurs where the estate has been originally granted to several persons in common. As this is a right depending on whose part fails first, the right to take such part on such failure is a remainder and is so treated.

211. **Presumptions of construction.**—It seems to be settled that where the courts can construe a devise to be a contingent remainder they will never construe it an executory devise.[98] On the other hand, the courts would go very far once in declaring a remainder vested if possible, as in the old days vested remainders were transferable and contingent remainders were not. But in most cases it is the intention of the testator that the remainder be contingent and so the presumption in favor of vested remainders is not so strong as formerly. There are two practical questions which always arise in connection with a remainder interest: First, whether it is vested or contingent; second, whether it is too remote. The latter question is discussed in Chapter XXII and following chapters of this article. Today the intention of the testator is more considered than these presumptions.

212. **Contingent remainders preferred to executory devises—Origin of the latter.**—A contingent remainder was preferred to an executory devise for two reasons. In the first place, the contingent remainder was established and the executory devise was modern. Furthermore, the judges did not like future limitations. There were no contingent remainders at all earlier than the sixteenth century

[98] See Chap. XXI.

and the first known case of an executory devise is later in the case of Pells v. Brown, in 1620.[99]

The second reason why contingent remainders were preferred was that the judges did not like to tie up property indefinitely. Executory devises slipped in unawares, first appearing in the case of Pells v. Brown,[1] and they were the terror of the judges for a long time until they became limited, and during that time the idea sprang up that the courts would favor contingent remainders. For one thing, contingent remainders were easily destructible. A limitation is never considered as an executory devise when it can take effect as a remainder, nor is a remainder ever deemed contingent when it can be interpreted as vested.

213. **Contingent remainder distinguished from conditional limitation.**—The difference between a contingent remainder and a conditional limitation is that a contingent remainder follows a life estate or some other estate less than fee, while if there is a fee given first which is to be cut off on the happening of certain conditions this may create a conditional limitation. The second estate cannot be a remainder because it is not to take effect at the natural determination of the first, but intervenes and destroys the first estate. The first estate cannot be a particular estate, for it is in fact a fee and may forever remain a fee if the condition does not happen. So the estate thus limited cannot take effect as a remainder but may be upheld as a conditional limitation, for al-

[99] See note 98.

[1] Cro. Jac. 590 (Eng.).

though nominally a fee, the estate is limited in its duration by the happening of the contingent event.

214. **Contingent remainder must not lap over preceding estate.**—A contingent remainder must not be such as to cut off the particular estate by lapping over it, as a remainder must wait until the determination of a prior estate. For example, suppose there is a limitation of an estate to a widow for life with remainder to A in fee on condition she remains a widow. This would be void, as it cuts off the widow's life estate. The limitation should be to the widow during her widowhood with remainder over and then the remainder will take effect upon the natural determination of her estate. This rule of course applies to estates at common law but not to a conditional limitation.

215. **Preservation of contingent remainders.**—A limitation will always be construed as a contingent remainder if possible instead of an executory devise, even if such construction invalidates the gift.[2] In New Hampshire the rule seems to be a little different. The courts there will give effect to the intention of the testator to preserve contingent remainders wherever possible. So where a testator devised property to his widow for life and after her death to the children of his two sons, though one of the two sons had died childless before the death of the mother and the other had no children at the time of her death, the court held a trust was implied and appointed trustees for the contingent remainder.[3]

[2] White v. Summers, 1908, 2 Ch. 256 (Eng.).
[3] Hayward v. Spaulding, 75 N. H. 92, 71 Atl. 219.

216. **Trusts to preserve contingent remainders.**—In England in the old days the life tenant usually destroyed a remainder in tail, which was of course contingent to the unborn children. A method of preventing this was to create a trust to support the contingent remainders, which trust then became a vested interest. As in case of a grant to A for life with remainder to trustees for life of A and to A's unborn children, the trustees have a vested estate, as they have an estate ready to take effect whenever the previous estate determines. An ordinary remainder to B and his heirs after an estate tail is vested as in case of a grant to A and the heirs of his body, remainder to B and his heirs. But where a grant is made to A and the heirs of his body, but if his estate ceases in the third generation then to C and his heirs, the remainder to C is contingent, as it may or may not last longer than the estate to A. A contingent remainder may be defeated by the destruction of the particular estate on which it rested, as by a feoffment or by surrender by the tenant or by the merger of the particular estate and the estate following the contingent remainder. The most common device to preserve contingent remainders is to create a vested remainder in trustees under a trust obligation to preserve them.

217. **What will support a contingent remainder.**—Under the old law where there were an estate to A for life and a contingent remainder to B, and A enfeoffs X, X gets a fee and there can be no remainder after a fee, so the contingent remainder fails. On the other hand if a conveyance is made to A for life,

with contingent remainder to B in fee, and A is disseized but afterwards enters on his own life estate, the contingent remainder is preserved, as it is settled that a right of entry is sufficient to support a contingent remainder. While in the first case a life tenant who made a deed wrongfully to another had no right of entry, the innocent disseisee in the second case has a right of entry. A mere right, however, will not support a contingent remainder, as in the case where there is an estate to A and the heirs of his body with a contingent remainder to B in fee, and A makes a feoffment to C and then dies leaving an heir who enters as the heir of his father under a writ of formedon.

A writ of formedon was so called because the plaintiff claimed per formam doni, Latin words meaning "according to the form of the gift," which the statute then declares should be preserved. This writ is not applicable to one who has a right of entry but applies only to one who has a mere right, and it is well settled that a mere right will not support a contingent remainder.

A contingent remainder was a very uncertain and slippery interest, as life tenants often made feoffments and destroyed such remainders by doing so.

218. **Merger of contingent remainders.**—For example, where A devised to B for life with remainder to her children as she might appoint and, in default of her issue, to C in fee, the situation was that there was a life estate in B with contingent remainder to her children and contingent remainder to C. In other words, there was a contingent remainder

with a double aspect. Therefore, when after the death of the testatrix B conveyed to C in fee, the remainder was merged with the life estate and cut out the contingent remainder. Today, however, contingent remainders are almost universally saved from this fate by statute. The above decision was the last expiring cry of feudalism in England and it is not law in this country but is given as an illustration of the English doctrine.

219. **Merger to squeeze out contingent remainder.**—A contingent remainder will often suffice to prevent a merger and keep estates apart where all estates are created by one person at one time. On the other hand, it was a common practice for the life tenant to buy in the remainder in fee, and under the principle that there could be no remainder after a fee, he thereupon had a fee and the contingent remainder was wiped out. This cannot happen, however, where the estates are created by one person at one time. For example, where a grant is made to T for life with contingent remainder to L and the remainder to the heirs of T, the reversion was to the heir of the testator, which was T, and ordinarily T's reversion would have merged into a fee in him, but in this case the contingent remainder suffices to keep the estates apart. So in case of a grant to A for life with a contingent remainder in tail and remainder to A in fee, there will be no merger and the contingent remainder stands.

220. **Alienation of contingent remainders.**—It was at first held that a contingent remainder could not be alienated as it was rather a possibility than

an estate; but it is now settled that where the contingency upon which the remainder is to vest is not as to the person but the event and where the person is ascertained who is to take if the event happens, the remainder may be sold or devised and the grantee or devisee will take the place of the grantor or devisor. But on the other hand, if the contingency is as to the person who is to take, there is no one in existence who can make a valid sale or devise of the remainder. Before the contingency happened contingent remainders could not be conveyed at common law, as the remainder was not an estate but a mere possibility of having an estate. The deed of the holder of a contingent remainder might operate, however, by way of estoppel to prevent him or his heirs from claiming under it.

221. **Same subject.**—At common law a deed which purported to convey a contingent remainder took effect, if at all, only by estoppel. A recent case presented this situation, that there was a devise of land to A for life, remainder to the children of A, and if A died without leaving children, to B and his heirs. A had one daughter who died during A's life. B died before A, leaving C and X as his heirs, and C during the life of A purported to convey the land to D with warranty of title. Both C and X died before A and the court holds that the will leaves a contingent remainder to B and his heirs; that nothing passes to D by deed from C and that the heirs of C are not estopped by the deed from claiming their interest in the land against D.[4] The court holds that

[4] Golladay v. Knock, 235 Ill. 412, 85 N. E. 649, Leading Illustrative Cases.

the heirs of C took their claim directly under the original will and not by descent from C because the title never vested in C.

222. **Statutes affecting contingent remainders.**—There are in some states statutes enabling freeholds to commence in the future. In other states the remainder may be limited on a contingency which will operate to cut off the precedent estate. And in still other states the probability or improbability of a contingency taking effect will not render it void. In other cases it has been held that no future estate can be affected or destroyed by any act of the preceding tenant or by any destruction of the preceding estate. In still other states future estates can be granted or devised in the same way as estates in possession.

223. **How a will may be drawn so as to give the devisee the right to sell and yet have the remainder go to a third person.**—The question often arises as to how to draw a will allowing the devisee the power of disposition and yet have the remainder of the estate go over to a third person upon the happening of an event. We have seen that this cannot be done under the ordinary limitation by the weight of American authorities. But it may be done by giving the devisee a life estate, with remainder to his children, with power to alienate in fee, provided that if he dies without issue, the remainder goes over to his brother's children. The theory of this devise is that, by the weight of authority, an executory devise after a life estate, coupled with power to alienate in fee, is good.[5]

[5] Williams v. Shillaber, 153 Mass. 541, 27 N. E. 767, 25 Am. Dec. 614.

To carry out the intention of the testator and save the executory devise over, the court will, when the language will permit, cut down a devise in fee to a life estate with power to alienate. This will be done to effect the purpose of the testator, where possible, since if the first gift must be treated as a fee simple, the executory devise limited upon it is void.[6] The condition upon which the property is to go over to a third person, must be a good one and not void for any reason.[7] The rule of property that where an estate in fee simple is granted it carries with it the right to alienate it by deed or will, and cannot be limited by a condition curtailing these incidents, is not enforced by the Scottish law.[8]

[6] Kalley v. Baker, 132 N. Y. 1.
[7] In re Stringer's Estate, 6 Ch. Div. 1 (Eng.).
[8] Scottish App. Cas. 592.

CHAPTER XXI.

CONDITIONAL LIMITATIONS—EXECUTORY DEVISES—SHIFTING AND SPRINGING USES.[9]

224. **An estate upon condition distinguished from an estate upon conditional limitation.**—An estate upon condition is granted on the limitation, or condition, that the grantee do certain things, or refrain from doing certain specified things. If the grantee violates the prescribed conditions, the grantor may re-enter and take possession. On the other hand, an estate upon conditional limitation is one where the whole estate is given to the grantee absolutely, but upon the happening of a specified event it is to terminate absolutely.[10] There is no re-entry necessary in this kind of an estate. The happening of the event terminates the estate, and the fee goes immediately to someone else. For example, an estate is given to A so long as B remains in Rome. Here A has an absolute estate so long as B remains in Rome, but the moment B departs from Rome the estate terminates, and no re-entry is necessary, since the estate ends on the happening of the event which limited its duration.

A proviso in a will that the estate devised shall terminate upon the happening of a certain event may be good as a conditional limitation, but void as

[9] As to limitations over upon a failure of issue see § 264.

[10] Henderson v. Hunter, 95 Pa. St. 335.

a condition. For instance, land is devised upon condition that the devisee does not marry. Such a condition is void as against public policy, since the law favors marriages, and any such obstacle placed in the way of marriage is generally regarded as against public policy. But if the estate should be given to the devisee while he remains single, and to terminate upon his or her marriage, it is good as a limitation. The distinction between the two devises is the distinction between a condition and a conditional limitation. In the first case the estate is held upon condition that the devisee does not marry, and that condition is void. In the other case the devisee is given an estate for an indefinite period, that is, while remaining unmarried, but this is not considered as a restraint upon marriage, since the will simply says so long as the devisee remains unmarried he shall have the possession of the estate, and upon marriage the estate terminates.[11]

225. **Same subject.**—An estate upon conditional limitation differs from an estate upon condition in several particulars:

1. When the grant is upon a conditional limitation, the whole estate passes from the grantor and nothing is reserved. Where there is a condition subsequent the right to re-enter upon breach of condition is reserved.

2. When the estate is upon conditional limitation,

[11] Mann v. Jackson, 84 Me. 400, 24 Atl. 886. It occurs to us that this is a distinction without much difference, as the desire to retain the estate in either case would tend to restrain the devisee from getting married. See, also, Proprietors of Church in Brattle Sqr. v. Grant, 3 Gray 142 (Mass.), 63 Am. Dec. 725, LEADING ILLUSTRATIVE CASES.

the happening of the condition specified terminates the estate and no re-entry is necessary. Where the estate is held upon condition merely, the grantor may enter or not, just as he pleases, but if it is limited to cease upon the happening of a particular event, when the event happens this is the end of the estate.

3. In the case of an estate upon condition there are always persons in being, the grantor and grantee or their representatives, who can unite and pass a perfect title in fee simple; while in the case of an estate upon conditional limitation, the whole estate passes to the grantee, and it being uncertain when the contingency may happen, there can be no one who can unite with the grantee and pass a perfect title.

In most cases the estate upon condition is to terminate upon the grantee dying without leaving issue him surviving. It seems to be a universal trait of mankind to desire that property shall be retained in the family. So the grantor makes a will granting his land to his son in fee and to his heirs, and then puts in a proviso to the effect that if he dies leaving no heirs or issue him surviving, the estate shall go to his brothers and sisters. This estate given in the first instance to the son, is an estate upon conditional limitation. The estate that goes over on the happening of the event, is called an executory devise. It is executed upon the happening of the event which terminates the first estate, that is, the failure of issue. It is a devise because it is an estate given in a will.

The third difference mentioned is the most important of the distinctions between an estate upon condition and an estate upon conditional limitation. It may be illustrated thus: Suppose A has the fee of land, and he grants this fee to B upon condition that he reside in a certain place, and there is a provision that A or his heirs may re-enter if B fails to perform the condition. A could then make another deed to B giving him the residue of the estate which he holds, and B would have a perfect title. Suppose both parties die, B's heirs get his estate and A's heirs get the right to re-enter for breach of condition, but if all these heirs would unite in a deed to a third person he would get a perfect title. There are always persons in being who can unite and give a perfect title in the case of an estate upon condition; but it is a case of conditional limitation, if an estate goes to A provided that if he die without issue the estate shall go to B and his heirs. A has the entire estate upon this conditional limitation. As it is not known whether A will die without issue, it is also uncertain whether B will be alive or dead when A dies. On the death of A without issue the estate goes over to the person then entitled to it; this person may not be in existence, since he may be born thereafter, consequently there are no persons in existence who can, by uniting in a deed, give a complete title in fee simple.

226. **Same subject.**—In the case of an estate upon condition it requires some act to be done, such as making an entry, in order to effect the transfer of the estate back to the grantor. In the case of a condi-

tional limitation the happening of the event is in itself a limitation, the limit beyond which the estate no longer exists, and the estate is therefore determined by the operation of law without requiring any act to be done by anyone. A familiar example to show the distinction is as follows: A grant to A provided she continues unmarried is an estate upon condition and can be taken advantage of only by the grantor or his heirs. But on the other hand a grant to A as long as she continues unmarried is an estate upon conditional limitation and the moment she marries the time for which the estate was to be held has expired and the estate is determined and closed. The intention of the testator or grantor often has effect in construing the estate and an estate apparently on condition is sometimes construed into a conditional limitation when necessary to carry out the purposes of the grant. An example of this is where there is a limitation over to a third party upon failure of the first taker to perform the conditions, as where an estate is granted by A to B on condition that B marry C within two years, and on the failure of the condition then over to D. This is construed as a conditional limitation, for if it was technically an estate upon condition it would require an entry to be made by the grantor to defeat it and the grantor might refuse to make such entry.

227. **Words of condition or of limitation.**—Ordinary words expressing a limitation are words relating to time, such as "during," "while," "until," and the like. The only rule, however, which can be laid down is that words indicating the time of determina-

tion of the estate are words of limitation, while expressions indicating that the estate itself is likely to be defeated in case of the happening of the event are words of condition. Each word must be construed according to its context.[12] For example, the word "provided" may be a word of limitation or of condition according to the sense and surroundings in which it is used. The general distinction, however, is clear that a conditional limitation is where the estate itself is limited to stop at a certain time and a condition is where the estate granted is itself defeated upon the happening of the condition.

228. **Rule against perpetuities applying to conditional limitation and not to condition.**—Where land is deeded for public purposes, to be used for such purposes only, upon condition that if it is not so used the grantor or his heirs may re-enter, it is best to have the grant limited upon a condition rather than upon a conditional limitation, the reason being that a condition need not be performed within the rule against perpetuities, while the conditional limitation would be governed by such rule.[13] Where an estate is granted upon a collateral limitation, the event which is to terminate the estate must happen within lives in being then and twenty-one years thereafter. So that if a deed conveying land for public purposes provides that the grantee shall hold the fee so long as he uses it for a public building, this is a conditional limitation, and must happen within the rule governing perpetuities, or the condition is

[12] Montgomery v. Petriken, 29 Pa. St. 118; Camp v. Cleary, 76 Va. 140.
[13] See § 266.

void and the grantee will take the absolute title. But if the estate is limited upon a condition it is not within the rule against perpetuities. In a Pennsylvania case[14] the property was deeded to the Methodist Church and the deed provided that the premises should be occupied by the church, but the grantor reserved the right to re-enter the premises if they ceased to be used as a church. It happened that the premises were occupied for several years as a church, when for some reason the Bishop abandoned the church and appointed no one to hold services there. An action was brought to recover possession of the premises, and the court held that the moment the grantee ceased to occupy it as a church, the right to re-enter accrued.

229. **A condition is to be distinguished from a trust.**—The courts in construing an instrument will sometimes interpret the language used as creating a trust and not a condition at all. For instance, where land is given in a will to be used and occupied by a church, the court held that a trust was created for the use and benefit of the church, and that it was not held upon condition.[15]

230. **The estate over in a conditional limitation is to be distinguished from a remainder.**—The estate over in a conditional limitation is not a remainder. A remainder is necessarily a part of the whole. At common law a fee could not be limited upon a fee, because a fee comprises the whole estate, and if the

[14] Henderson v. Hunter, 95 Pa. St. 335.

[15] Neely v. Hoskins, 84 Me. 386, 24 Atl. 882, Tiedeman's Leading Cases, p. 233.

whole estate is granted there would be nothing left as a remainder. A grant of an estate in fee upon a conditional limitation that the estate shall cease and go to a third person on the happening of an event, does not give the third person to whom the estate may go a remainder, but only a contingency of receiving the entire fee upon the happening of the event.[16] A devise to A for thirty years, remainder to B in fee, is an illustration both of the particular estate and a remainder. In this case the particular estate at the end of thirty years ceases by limitation. It is a definite and specified part of the fee; the remainder, which is the part of the fee left after carving out the estate for years, begins when the particular estate drops out. The particular estate may also be for an indefinite period, as a grant to A until B returns from Rome, and then to B in fee, here A has a life estate liable to be cut short by B's returning from Rome, and B has a remainder in fee.

But a grant to A and his heirs until B returns from Rome, and then to C in fee, does not give any remainder to C. A has a fee simple estate upon conditional limitation. The difference is, that in the one case you have given to A nothing more than a life estate, which is likely to be terminated upon B's returning from Rome; in the other case you have given A a fee simple liable to be terminated upon the happening of the event. In the first case there was a remainder over because A could not live forever, and the estate could only last so long as he lived; in

[16] Proprietors of Church in Brattle Square v. Grant, 3 Gray 142 (Mass.), 63 Am. Dec. 725, LEADING ILLUSTRATIVE CASES.

the last case there is no remainder over, since unless B returns from Rome, A and his heirs have the fee, and what goes to the third person, if anything, is not a remainder, but the fee.

231. **An estate upon conditional limitation distinguished from an estate tail.**—An estate upon conditional limitation differs from an estate tail in this: that in an estate tail the ancestor has not parted with his entire estate, and upon failure of the designated heirs, the estate reverts, while in a conditional limitation, as we have seen, the ancestor or grantor has parted with his entire estate.

232. **Limitation over of estate undisposed of.**—If an estate is granted to A and his heirs in fee, upon the conditional limitation that if he dies without leaving any heirs him surviving (that is, a definite failure of issue, since if it was construed as an indefinite failure of issue it would be void as contravening the rule against perpetuities), the estate shall go over to B, this limitation is good under the case decided in 1620.[17] But suppose instead of giving the entire estate to B, the grant is, that so much of the estate as remains undisposed of shall go over to B. The question then is, what estate goes to B? The grantor has given to A the fee simple and also given him the power to convey the fee simple absolutely, whether he leaves any issue or not, but provides that if A does not sell it all what remains shall go to B.

The English cases held that this was nevertheless a good limitation, and this seems to be the law of the English courts now. But in America the weight

[17] Pells v. Brown, Cro. Jac. 590 (Eng.). See § 234.

of authority is that the executory devise over in such a case is void.

Origin of American rule. The first case decided upon this point was Ide v. Ide,[18] and that was followed by Jackson v. Bremsler,[19] decided in 1813. These two cases have been followed by a great number of American courts. The case of Ide v. Ide was based upon the case of Attorney General v. Hall,[20] in which case the testator left both real and personal property to his son. The real property was given to him under words which created an estate tail, without question. Now, under the rule of property that where both real and personal property are conveyed or devised by the same words, and such words create an estate tail as to the realty, the devisee takes the personal property absolutely. The court held that the language used created an estate tail in the land. The devisee suffered a common recovery and converted his title into a fee simple, and then died leaving a large part of his personal property unsold. The will provided that if he should die without issue the property should go to the Goldsmith Company, of London. The son had made a will, making his widow his executrix. The Attorney General for the use of the Goldsmith Company filed a bill for an accounting of the personal property, and the question was what estate did the first devisee take under the will; and what interest, if any, went to the Goldsmith Company in the personal property

[18] Ide v. Ide, 5 Mass. 500.
[19] 10 Johns. 18 (N. Y.).
[20] Fitzg. 314 (Eng.), W. Kel. 13 (Eng.).

that had been devised to the son, the son having died leaving no issue. The court held, first, that the devisee took an estate tail in the real property, and having suffered a common recovery had thereby converted it into a fee simple; second, that taking an estate tail in the realty gave him the personal property absolutely, and any restriction on such a gift was a violation of the rule of property as repugnant to the grant, and therefore void.

The Massachusetts court commenting upon this case said, since the power to dispose of the personal property was given, the executory devise over was void. But that was not the decision; which was that when the devisee was given the property absolutely, the executory devise was void. It was not void because the first devisee was given the power to sell, but because the power to sell was incident to the estate granted, and he could not be deprived of it by any limitation.

When the case of Jackson v. Bremsler[21] was decided, the court did not have before them the case of Attorney General v. Hall, but had before them a case in the 2d Vesey, in which this case was commented upon. As a result of this misunderstanding of the language of the court in the Fitzgiven case, the American courts have decided, and the decision is followed by the weight of authority, that where an estate is devised in fee, and then the devisee is given the power to dispose of it in fee simple absolute, and a provision is made that what is left shall go over to a third person, this proviso is void, and

[21] 10 Johns. 18 (N. Y.).

nothing will go over, the first devisee taking the absolute fee.

233. **Meaning of an executory devise.**—An executory devise is an estate given by will upon a conditional limitation, which interest goes over to a third person upon the happening of the event which terminates the first estate created by the will.

Since the tenant taking the estate upon the conditional limitation could not defeat the executory devise, or because the power to alienate is repugnant to a base or qualified fee, it is held that, if a testator gives and devises a qualified or base fee, and then gives the devisee power to alienate the land, he thereby defeats the executory devise over. That is, if by giving the right to sell, the testator has given the fee absolute, the courts hold that he cannot, also, provide for its termination, as this would be repugnant to the grant.[22]

234. **Origin of executory devise.**—It was a rule of the early common law, at first strictly adhered to, that if a fee absolute was granted, it could not be limited by any condition in the grant in derogation of the fee. But in 1620 the court held that an estate could be granted upon a conditional limitation.[23]

The facts in the case cited were: land was devised to A and to the heirs of his body, provided, that if he died leaving no issue him surviving, the estate should go to B. So far as the first part of this devise

[22] Ide v. Ide, 5 Mass. 500; Jackson v. Bull, 10 Johns. 18 (N. Y.); Van Horne v. Campbell, 100 N. Y. 287; Proprietors of Church in Brattle Sqr. v. Grant, 3 Gray 142 (Mass.), 63 Am. Dec. 725, LEADING ILLUSTRATIVE CASES.

[23] Pells v. Brown, Cro. Jac. 590 (Eng.).

is concerned, it would apparently create an estate in fee tail general, but the proviso was that if he die leaving no issue him surviving, then the estate should go over to B. The court held that in such a case, the expression, "dying without issue him surviving" meant an indefinite failure of issue. That is, it is an extinction of the line, and when there are no longer heirs of the body in existence, then the estate goes over, while if it means a definite failure of issue, then it is not an estate tail. In the case of Pells v. Brown, after the death of the testator A went into possession and suffered a common recovery. He had converted what he assumed to be an estate tail into a fee simple. After A's death the executory devisee, that is, the one entitled to the estate under the terms of the grant upon A's dying without issue him surviving, brought an action to recover the property. The first question was, did this grant create an estate tail? If it did, it had been barred by a common recovery and converted into a fee.

As we have seen, the tenants in tail are always barred by a common recovery, because their ancestor has received a judgment for the value of the land from or against his grantor, which afterwards bars and estops him and his heirs claiming any interest in this land. The judgment is also a bar against his descendants claiming any interest in the lands, since the judgment is regarded as binding upon the party and his privies. But the court held that an executory devisee was not a party to the proceedings at all, either directly or inferentially, and consequently the

proceedings in common recovery did not bar his right to the estate, if the first taker died without issue.[24]

235. **Shifting or springing use.**—While at the early common law one may not make a grant in fee, and at the same time annex conditions which are repugnant to the grant, as to grant a fee absolute and at the same time provide that the grantee shall not alienate the estate granted, yet it is held to be permissible to grant a fee and provide that if the first taker dies without issue, the estate granted shall terminate and the fee go over to a third person. If such an estate is created by will, we have seen that it is termed an executory devise, while if it is created under a deed, it is called a shifting or springing use. That is, the creation of such an estate could not be made by a direct conveyance at common law, and was made by way of a trust or use, by which land was conveyed to A for certain specified uses, and which provided that if a certain event happened the particular use or trust should cease, and the lands be held to another use or trust. Thus if lands are granted to A and his heirs, for the use of B and his heirs, but in case A should die under age, then to the use of C and his heirs, the death of A under age terminates the first use, and it shifts to C.

If land is conveyed in a deed to B and his heirs, and then upon a certain event over to a third person, such a condition would be void, because you cannot limit a remainder upon an estate in fee simple.[25]

[24] Treated further in § 238. See, also, Hayward v. Spaulding, 75 N. H. 92, 71 Atl. 219.

[25] Lyon v. Kee, 120 Ind. 150, 22 N. E. 128. See as to the effect of uses, Leake, 112, 113, LEADING ILLUSTRATIVE CASES.

CHAPTER XXII.

THE RULE AGAINST PERPETUITIES.

236. **Definition.**—The rule against perpetuities has been stated as follows: "No interest subject to a condition precedent is good unless the condition must be fulfilled if at all within twenty-one years after some life in being at the creation of the interest."[26] If the interest begins within the limit it is not obnoxious because it may extend beyond that period. The common law rule governing perpetuities is, that the condition must happen within a life or lives in being and twenty-one years and the period of gestation thereafter.

The rule has been defined more particularly as follows: "Executory interests other than those in remainder after or engrafted on an estate tail, must be so limited that, from the first moment of their limitation, it may be said that they will necessarily vest, in right, if at all, within the period occupied by the life of a person in being, that is, already born or in his mother's womb, or the lives of any number of persons described and in being, 'not exceeding that to which testimony can be applied to determine when the survivor of them drops,' and by the infancy of any child born previously to the decease of such person or persons; or the gestation and infancy of any child in his mother's womb at that time, or

[26] Gray, Perpetuities (2nd ed.), § 201.

within the period occupied by the life or lives of such person or persons in being and an absolute term of twenty-one years, afterwards, and no more, without reference to the infancy of any person; or within the period of an absolute term of twenty-one years without reference to any life."[27]

237. **Origin.**—There are two questions of practical importance that naturally arise in considering future interests. In the first place, there is the question of construction whether a gift is vested or contingent. In the second place, there is the entirely different question of remoteness which is not at all a question of construction. The rule against perpetuities is not aptly named; it would be more exact to call it a rule against remoteness, that is, that the interest must not vest at too remote a period. The question first arose on account of the sustaining by the court of executory devises, which was first done in England in the case of Pells v. Brown,[28] in 1620. The possibilities of indefinitely tying up property under this decision and the reasons of public policy against it caused the courts to cast about for some means to preserve the right of alienation of property. The growth of the doctrine that certain interests are void as too remote has been by way of judicial legislation and the rule against perpetuities is one of the best examples of the usurpation by the judiciary of legislative functions. The rule has grown up step by step, as cases have arisen, until it is now well settled and generally acquiesced in.

[27] Smith, Executory Interests, § 706. See, also, Beard v. Westcott, 5 Taun. 394 (Eng.); Cadell v. Palmer, 1 Cl. & Fin. 372 (Eng.).

[28] Cro. Jac. 590 (Eng.).

238. **Effect of the creation of executory devises.** —Executory devises or interests, as they are called, in their very nature, by putting off the vesting of an estate, tend to perpetuities, since they render the fee simple inalienable during the period appointed for the happening of the event or contingency. It being impossible to determine who shall receive the estate over, at any particular time, it is impossible to convey a perfect title, and this ties up the estate so as to prevent alienation, that is, it tends to perpetuities.

The attitude of the English courts toward the new executory devises was well set out in Scattergood v. Edge,[29] where the court, speaking by Chief Justice Treby, remarked: "These executory devises had not been long countenanced when the judges repented them; and if it were to be done again it would never prevail; and therefore there are bounds set to them, viz., a life or lives in being; and further they shall never go by my consent at law, let chancery do as they please."

The common law courts had decided that a grantor could not limit a fee upon a fee, but that he might grant a fee and then provide that the fee should terminate upon the happening of a certain event and go over to a third person. Then they established the rule that the event which would terminate the fee, must be an event which would happen within a certain time, and this time came to be judicially fixed at an early date, as a life or lives in being and twenty-one years thereafter. So that an estate can be given

[29] 12 Mod. 278, 1 Salk. 229 (Eng.).

to A for life, remainder to B for life, then to C for life, and so on indefinitely, and then to X and his heirs in fee, provided that if X dies leaving no issue, then the estate should go to Z. At the common law one could grant the estate for as many lives as one saw fit and twenty-one years thereafter, to which may be added the period of gestation, should gestation actually exist.

239. **Growth of rule—Limitation within life in being.**—One of the first cases explaining the rule was the Duke of Norfolk's in 1682,[30] which established that a future contingency on a contingency is not too remote if it must take effect within a life in being. The case showed a trust of a term for two hundred years to H in tail, but if T died without issue in the life of H so that T's earldom descended on H, then to C in tail, and the court holds that it is no objection that it is a possibility on a possibility.

240. **Number of lives in being.**—It is no objection on the ground of remoteness that an estate is limited to last during several lives in being at the time the estate is created rather than simply during one life in being. As was said in an old case, "So if instead of three there had been twenty lives, all spending at the same time, all the candles lighted up at once, it would have been good; for, in effect it is only for one life, viz., that which shall happen to be the survivor."[31] The contingency may be postponed for any number of lives in being, at the common law, and the persons designated need have no interest in the estate.[32] The

[30] 3 Ch. Cas. 1 (Eng.).

[31] Low v. Burron, 3 P. Wms. 262 (Eng.).

[32] Thellusson v. Woodford, 4 Ves. 227, 11 Ves. 112 (Eng.).

only limitation suggested by the courts, independent of statutory limitations, is that the number of lives must not be so great that it will be impossible to determine by evidence when the last survivor shall die. Suppose a gift provide for a limitation during the lives of all those persons named in a directory. The subject has never been fully worked out, but that gift would clearly be bad. The accepted test now is that it must be limited so that evidence of death may be obtained. In Wisconsin, New York, Minnesota, and perhaps some other states, the rule against perpetuities has been modified by statute so that the condition must happen within the period of the lives of two persons in being at the time of the creation of the estate.[33] Where the common law rule has not been modified by statute, the rule is the same on both sides of the Atlantic.[34]

241. **Number of lives used as test.**—It is necessary that the lives in being used to measure the rule should be ascertainable. But it is enough if they can be ascertained, although not expressly named by a construction of the whole will. For example, a will giving the residue "to be placed in trust for as long a period as is legally possible" may be a valid limitation where the will also provides distribution of this trust by paying annuities to over forty persons named. The court remarks that "when the testator created the trust in the language already quoted, he must have intended it should be measured

[33] Manice v. Manice, 43 N. Y. 303.

[34] St. Amour v. Rivard, 2 Mich. 294; Jackson v. Phillips, 14 Allen 539 (Mass.); Anderson v. Jackson 16 Johns. 382 (N. Y.); Dean v. Mumford, 102 Mich. 510.

by some lives then in being and for not more than twenty-one years thereafter, because that is the longest time a trust of that kind is legally possible, and he provided it should last as long as that." The payments to the annuitants should stop with the death of the last survivor of the annuitants named in the list and twenty-one years thereafter. Distribution of the entire corpus of the fund remaining with the trustee is then to be made as provided for in the will. The testator intended a valid rather than an invalid disposition and this construction prevents the trust ever being bad for uncertainty or remoteness. There is no reason for holding that the number of annuitants, which exceeds forty, is too large for a valid limitation of the trust, as there are cases in the books where a larger number than that has been held not to exceed a valid limitation.[35]

242. **Period in gross added to rule.**—A period in gross beyond a life in being of twelve months was next added to the limitation in the case of Lloyd v. Carew,[36] in 1697. It was argued against this addition to the rule that this was an extension of the mischiefs of perpetuities, but the view that seemed to find favor with the court was that there was no reasonable difference between a limitation during a life and within one year afterwards, that no inconvenience could arise through the additional year and that the failure to consider it valid would result in great hardship in the case under consideration. This case is an excellent example of the fact that the rule

[35] Fitchie v. Brown, 211 U. S. 321.
[36] Shower's P. C. 137 (Eng.).

against perpetuities is purely a rule of convenience evolved by the courts.

243. **Period of minority added to rule.**—In 1736 the courts went so far as to add to the lives in being the period of minority and[37] this case opened the way to the longest period which is now possible, that is to say, a limitation "to those of my grandchildren who reach twenty-one." That is a good limitation, as the grandchildren must be born in the life of the children and the limitation can only last twenty-one years after the life of the children. If the limitation, on the other hand, is in gross, that is to say, if it is to the grandchildren of another, then the validity of the limitation depends on whether that other is dead or alive at the time of the death of the testator.

The term twenty-one years may be taken in gross, without any reference to the infancy of the person to take the estate. In other words you can, within the rule against perpetuities, suspend the power of alienation during any number of lives in being and for a period of twenty-one years thereafter, by having the estate go to trustees to be then distributed among the beneficiaries.[38] This term of years begins to run not from the execution of the will, but from the time the will takes effect, that is, at the testator's death.[39]

244. **Period of gestation added to rule.**—The last extension of the rule against perpetuities was to add

[37] Stephens v. Stephens, Cas. t. Talb. 228 (Eng.).

[38] Cadell v. Palmer, 1 Cl. & Fin. 372 (Eng.); Barnitz's Lessee v. Casey, 7 Cranch 456 (U. S.).

[39] In re Rye's Settlement, 10 Hare 106 (Eng.); Hosea v. Jacobs, 98 Mass. 65.

to it the nine months period of gestation and the rule is now settled that the periods of gestation are to be reckoned whenever it is for the interest of any person that they should be. So where there was a devise to the wife during widowhood, then to T for life, and on his death to his issue male, and in default of issue to G S in the same way, and then to a child of the testator in his mother's womb, and then over to P, this is a good limitation, as it must take place within a life in being and twenty-one years and the period of gestation.[40]

245. **Several periods of gestation.**—So where the limitation is made to those of my grandchildren who reach twenty-one, but if none such, then to the grandchildren of T then living, and there is a posthumous child and then a posthumous grandchild, and T's daughter is pregnant at the death of this grandchild, there are three periods of gestation, but they will in all probability be allowed and the gift held good, as a child conceived is generally held legally born.

246. **Posthumous children.**—At common law if property was given to A in fee and he dies leaving a daughter and subsequently a posthumous son is born, the son takes to the exclusion of the daughter. But if property is given to A for life and on his death to his surviving children, and he leaves a daughter and then a posthumous son is born, the daughter takes. The distinction between the two cases is that in the first case the children take by descent, while in the second case they take by purchase, that is, they take under the direct terms of the original grant or

[40] Long v. Blackall, 7 T. R. 100 (Eng.).

will and not simply by reason of being descendants of the original owner.

At common law only those can take as purchasers who were alive when the particular estate determined. But in the case of descent the estate at common law always shifted to the son. This ancient distinction, however, has now been wiped out and at present a posthumous child is always considered as already born for all purposes for his own benefit.[41] The courts have now gone a step further by holding that a posthumous child may be considered as born for the benefit of others. For example, there was a grant "to A and on her death to B if B at that time had issue living." On the death of A there was a child of B unborn which was born shortly after the death of A. This situation it is clear had no direct effect on the interests of the posthumous child, as the grant was not in either event for his benefit. But the court held that he was born for the benefit of his father B, and it was found that the condition as to having children living was satisfied.[42] This whole doctrine has been developed by the courts by a system of judicial legislation such as is very often found in the law. It is hard to say how far the doctrines here laid down are developed in each state, but this the student must examine for himself. It has recently been established in England that an unborn child will not be considered as born when it would be to his disadvantage,[43] as where his exist-

[41] In re Salaman, 1908, 1 Ch. 4 (Eng.).
[42] In re Burrows, 1895, 2 Ch. 497 (Eng.).
[43] Villar v. Gilbey, 1907, A. C. 139 (Eng.).

ence might render valid a limitation over which otherwise would be void.

247. **Effect of possibility of issue extinct.**—An attempt was made to make an exception to the rule in those cases where it was evident that the parties were too old to have children. But the courts refused and insisted that the question was whether the limitation was good in its creation and not whether it was good having in mind the events which have happened. The court will not inquire whether a woman is past child bearing. So where a gift was made to the wife for life and on her death to M H and the issue of her body begotten and lawfully to be begotten and in default to be divided between the daughters then living of J J and E J, who were then over seventy, the court held that this gift was void, as it does not necessarily vest within lives in being and twenty-one years. The fact that J J was unlikely to have children cannot displace the rule of law.[44] The rule against perpetuities is a severe rule which applies without regard to the circumstances of the particular case, so a gift to the grandchildren of A when they reach twenty-one would be void, although the children are childless long after childbirth is possible.

The courts have, however, sustained an arrangement by which the life tenant made a sale with the consent of the remainderman where the life tenant was past child bearing, although there was a limitation to her issue, where the life tenant gave security, but, of course, if the grantees object to that arrange-

[44] Jee v. Audley, 1 Cox 324 (Eng.).

ment it must fail, as no clear title can be given them and such title cannot be forced upon them.[45]

248. **Reason for rule.**—The reason for the rule against perpetuities is that land should not be taken out of commerce. There are two ways of doing this. First, by restraint of alienation; second, by the creation of interests to take effect at future periods, which make the land practically inalienable. The old reason for a distinction between contingent and vested interests was that vested interests were alienable and contingent were not. The reason today for the distinction is that a vested interest is usually ascertainable while a contingency is not marketable and its value is not ascertainable; and a contingency hampers an estate while a vested interest does not. It has been also suggested that the desire to keep land or personal property in commerce is not the sole reason for the rule against perpetuities, but there may be another reason, viz.: to give present owners so far as possible absolute estates which they can manage, as when ownership in property is in danger of being lost by a future contingency the property is not likely to be used with that energy and interest with which it would be used if it were a man's own.[46]

249. **The New York rule.**—The law of New York under its statute has been until recently in an unsettled condition, as it was uncertain as to whether alienability or remoteness was the test of validity in that state. This question has been answered by a recent case,[47] in which the court finds that a gift may

[45] Leng v. Hodges, Jac. 585 (Eng.).
[46] Gray, Perpetuities (2nd ed.), § 603f.
[47] In re Wilcox, 194 N. Y. 288, 87 N. E. 497.

be bad for remoteness while the alienation is not suspended beyond too remote a period, as the court says that the statute requires that estates shall vest as well as become alienable within the statutory period. The court remarks that the revisers of the statutes were versed in the common law which required vesting and that § 40 on which the court relied would otherwise be surplusage. The courts and writers had generally appeared to take the alienability test for granted and this case is therefore of great importance. The case presented the question of a bequest of personal property to the executors in trust to pay the income to W for life with the limitation "and at her decease I give to her issue share and share alike such income and as each of her said issue shall attain the age of twenty-one years I give * * * to it one equal undivided share of the principal * * * and in case W * * * shall die leaving no issue * * * which shall attain the age of twenty-one years," then the fund was to go to B and C, persons then living, and the court holds that the gift to B and C is void for remoteness and that the testator died intestate as to all interests provided after the death of W.

250. **Alienability not the test.**—It is not the alienability of the limitation but the fact that it is subject to a condition precedent which may bring it within the rule against perpetuities. For example, a gift of property to a church so long as the property is used as a parsonage, then to B and his heirs, is bad, although B could alienate it at any time. The opposite view might have been adopted and alien-

ability might have been the test, but that is not the law today.

251. **Mere possibility that limitation may be remote invalidates it.**—In order that the condition may be good, which creates an executory interest, it must necessarily happen within the prescribed period fixed by the rule against perpetuities. So that if there is any possibility that the happening of the event will lap over this limit for any length of time, the limitation is void.[48]

"When a gift is infected with the vice of its possibly exceeding the prescribed limit, it is at once and altogether void both at law and in equity. And even if, in its actual event, it should fall greatly within such limit, yet it is still as absolutely void as if the event had occurred which would have taken it beyond the boundary. If, however, the executory limitation should be in defeasance of, or immediately preceded by, an estate tail, then, as the estate tail and all subsequent estates may be barred by the tenant in tail, the remoteness of the event on which the executory limitation is to arise will not affect its validity."[49]

252. **Where subject of gift must fail within the period.**—If there is a term for twenty years, but if the tenant dies without issue male, then to B, this limitation is good, as it is something which in its nature cannot last more than twenty years.[50] This

[48] Palms v. Palms, 68 Mich. 355; Proprietors of Church in Brattle Sqr. v. Grant, 3 Gray 142 (Mass.), 63 Am. Dec. 725, LEADING ILLUSTRATIVE CASES.

[49] Williams, Real Property (6th ed.), p. 319; Newman v. Newman, 10 Sim. 51 (Eng.); Jarman, Wills, p. 233.

[50] Low v. Burron, 3 P. Wms. 262 (Eng.).

is but another proof that the rule against perpetuities is a rule of convenience and not a technical rule of law.

253. **Description of beneficiary.**—It does not make any difference how a man is described if he can take. So if there is a gift to grandchildren when they reach twenty-five and the only living grandchild at the testator's death has already reached twenty-five, the gift is good. A common trap which must be avoided by conveyances is a gift "to my daughter for life and on her death to her husband for life and on his death to their then surviving children," as here the husband whom the daughter may marry may be yet unborn, so that this limitation is clearly bad. The gift should expressly provide "to such husband as is living at my death."

254. **Gift construed as valid if possible.**—Most of the rules regarding wills are rules of construction which yield to the intention of the testator, but the rule against perpetuities is more like a stencil plate fitted on to the estates created by will. There may, however, be cases for construction; and if in one construction of a will a gift is too remote and in the other not, then the one which makes it good will prevail. This rule of construction can only apply in a close case where it is entirely uncertain what the construction should be. The rule has its foundation in the theory that it is a fair presumption that the testator intended to create a legal rather than an illegal restraint. So where there is a devise to the wife for life and residue on trust for the grandchildren of the testator's daughter when they reach

twenty-five and three were living at the death of the testator and his wife, the court holds that those only of the grandchildren are entitled to take who were in existence at the death of the life tenant.[51] The theory of the case is that if postponing the termination of a class would render the limitation to the class too remote, the class will be determined at once and those then entitled under the limitation will take at once.

255. **Effect of remoteness.**—If the executory or future estate is too remote it is simply void, and the first estate becomes free from such limitation. Thus if an estate is given to A for life, remainder to his children who arrive at the age of twenty-five, and at the time the testator dies, A to whom this estate is given, is unmarried, the remainder over is void as being too remote. Since the condition is void, A takes the life estate, and the remainder over goes to his heirs.[52]

If the prior estate is for years or for life, the remainder over, in case of the condition being void, goes to the heir or residuary legatee, depending in part upon the statute and in part upon the construction of the deed or will.[53]

If the contingency upon which the future estate is to vest is stated in the alternative, it may be good in part and bad in part. Thus if a gift is to A for life, remainder to his unborn children if they reach

[51] Kevern v. Williams, 5 Sim. 171 (Eng.).

[52] Proprietors of Church in Brattle Sqr. v. Grant, 3 Gray 142 (Mass.), 63 Am. Dec. 725, LEADING ILLUSTRATIVE CASES.

[53] Shanley v. Baker, 4 Ves. 732 (Eng.); Van Kleeck v. Reformed Protestant Dutch Church of New York, 20 Wend. 457 (N. Y.), 6 Paige 600 (N. Y.).

the age of twenty-five, remainder to the children of B, it is void, because none of the children may reach the age of twenty-five within twenty-one years after A's death. But a gift to A, and if he dies without issue, or none of his children reach the age of twenty-five, remainder to the children of B, is good if he dies without issue, but is bad if he dies with issue under twenty-five. The reason for this is that the event of his dying without issue necessarily happens at the end of a life in being, while the other alternative, that the children shall reach the age of twenty-five, may not occur within twenty-one years after his death, and therefore if he dies leaving children under twenty-five it is void, if he dies without issue it is good.[54]

256. **Possibility on a possibility.**—The doctrine of the invalidity of a possibility on a possibility has been confined to a limitation like the following: To an unborn person for life with remainder to his unborn child.[55]

The rule against "double possibilities" in England seems to be confined to a limitation to an unborn person for life with remainder to his unborn children and is sustained as "embodying a useful and intelligent restraint," which, however, has not been followed in this country.

257. **Accumulations.**—In the great case of Thellusson v. Woodford,[56] there was a direction for accu-

[54] Proctor v. Bishop of Bath & Wells, 2 H. Bl. 358 (Eng.); Cattlin v. Brown, 11 Hare 372 (Eng.).

[55] In re Nash, A. C. 1909 (Eng.); In re Frost, 43 Ch. Div. 246 (Eng.). See, also, § 209.

[56] 11 Ves. 112 (Eng.).

mulation during the lives of nine persons and their issue living at the death of the testator and born in due time afterwards, and the court holds that the expression "born in due time afterwards" means that the mother was pregnant of the child when the testator died. This decision opened such possibilities in the restriction on alienation of property that statutes, commonly called the Thellusson Acts, were speedily passed to avoid them.

An act of Parliament was passed in the reign of George III,[57] forbidding the accumulation of income for any longer term than the life of the grantor or settlor, or twenty-one years from the death of any such grantor or settlor, or during the minority of any person living or in his mother's womb at the death of the grantor, or during the minority only of any person who, under the settlement or will, would for the time being, if of full age, be entitled to the income so directed to be accumulated.

258. **Same subject.**—In the Thellusson Case the residue directed to accumulate amounted to five hundred thousand pounds and the practical effect of the will was to tie up the estate for nearly a century, during all of which time the family could derive no benefit therefrom. Statutes have been passed in various states, notably in Pennsylvania and New York,[58] along the line of the English Thellusson Acts, providing that accumulations may be directed only for the benefit of one or more minors exclusively, and if the minor dies during minority the accumu-

[57] 39 and 40, Geo. III, c. 98.
[58] Vail v. Vail, 4 Paige 317 (N. Y.).

lation terminates at his death. It is generally held that where the direction for accumulation exceeds the statutory period it is good for the period allowed by law and invalid as to the excess, while if an accumulation is directed for a period greater than that allowed by the common law rule against perpetuities the direction for accumulation is void entirely. Where there is a present vested interest created, then the beneficiary may, apart from any statute on the subject, stop the accumulation at any time, as the direction is an illegal restraint on alienation, so under the statutes, unless the statute expressly provide what disposition shall be made of the fund, the direction for accumulation is void.

CHAPTER XXIII.

APPLICATION OF THE RULE AGAINST PERPETUITIES.

259. **In general.**—With the exception of charities the rule against perpetuities in England applies to all future interests, while in this country it applies to all future interests except conditions. Conditions, however, are to be carefully distinguished from conditional limitations, as appears from § 224 of this article.

260. **The rule does not apply to vested interests.**—The rule against perpetuities does not apply to vested interests and it does not apply to contingent remainders where the contingent remainder must take effect, if at all, in the time limited by the rule against perpetuities. A vested interest is never repugnant to the rule against perpetuities, since it is not subject to a condition precedent, and the person who has the vested interest has also the right to alienate it. So if a contingent remainder must become a vested remainder within twenty-one years after lives in being, such a contingent remainder will be good.[59] If the remainder is vested it is good, although the contingency may not happen which terminates the particular estate within lives in being and twenty-one years thereafter.[60]

[59] In re Roberts, 19 Ch. Div. 520 (Eng.).
[60] Same; Toms v. Williams, 41 Mich. 552.

261. **Estate tail.**—All limitations which must take effect, if at all, at the end of an estate tail which is destructible are good. A limitation after an estate tail is not too remote. A remainder after an estate tail male on failure of issue generally is good, as it is a contingent remainder which cannot take effect at all if not at the termination of the estate tail. On the other hand, a grant of a reversion after an estate tail male to take effect on failure of issue generally is too remote. The only case where the rule against perpetuities has affected the construction of limitations is in the case where there is a grant to A for life, remainder to A's unborn son for life, remainder to his sons in tail male. The grant to A for life is good, and to the son for life is good, and beyond that the limitations are void. But the courts have construed this to be an estate tail male to the unborn son. This makes a great difference not only as to the validity of the gift but because it gives the unborn son a right to bar the entail.

262. **Limitations before and after an estate tail.**—Where there is a limitation which must vest if at all at or before the termination of the estate tail it is never too remote, for there is always someone to destroy it by barring the entail, although the tenant in tail may be a minor. These questions have not been worked out in this country to any extent on account of the small number of estates tail, but in England it seems to be law that trusts for the accumulation of rents during the minority of tenants in tail are void for remoteness, though such tenants have a vested interest in the accumulations when

the trusts are prior to the estate tail. It further seems to be law that the trusts of a term prior to estates tail may be too remote though limited on contingencies which must happen if at all during the continuance of the estate tail.[61] It has been suggested that when the question arises in the United States "the decision ought to turn on whether the trusts in property are in control of the tenant in tail of the property and not on the order of the limitations." The result of the English rule seems to be that the same estate before an estate tail may be void, while after the estate tail it may stand as valid; that a limitation after an estate tail, provided it cannot take effect before the expiration of the estate tail, cannot be open to the objection of remoteness, while a limitation before the estate tail is not good unless it comes within the rule against perpetuities.

263. **Limitations after equitable estate tail.**—A limitation which may be a good contingent remainder after a legal estate tail may be bad after an equitable estate tail, because it is not then a remainder but may take effect at a time after the estate tail has come to an end. So a contingent remainder after an estate tail male on failure of issue generally is good because, unless it can take effect on the termination of the estate tail, it cannot take effect at all; but it would be void if it were an equitable remainder, as a man's male issue may come to an end long before his issue generally come to an end.[62]

[61] Gray, Perpetuities (2nd ed.), § 471.
[62] Gray, Perpetuities (2nd ed.), § 451.

264. **Limitations over upon failure of issue.**—The more common cases of executory devises which are held void as contravening the rule against perpetuities are those where property is given to A, remainder over upon an indefinite failure of issue. We have seen that if the estate over is given upon definite failure of issue, it does not violate the rule. "A definite failure of issue is when a precise time is fixed by the will for the failure of issue, as in the case where there is a devise to one, but if he dies without issue, or lawful issue living at the time of his death, etc. An indefinite failure of issue is the period when the issue of descendants of the first taker shall become extinct, and when there is no longer any issue of the line of the grantee, without reference to any particular time or any particular event."[63]

Suppose an estate is given to A and his heirs in fee, provided that if A dies without issue him surviving, it shall go over to B. What does such a limitation mean? Does it mean that if A dies without children or issue, the estate shall go to B, or does it mean that the estate goes over only when the line of issue from A shall have become extinct, which might not be for an indefinite number of generations? Now if it means the former, it is a definite failure of issue that is meant, if it means the extinction of the line of direct issue, then it is an indefinite failure of issue, because the time when the line of issue shall become exhausted is exceedingly indefinite, and may not arrive for centuries. The death of A,

[63] Huxford v. Milligan, 50 Ind. 542.

on the other hand, is definite, and is bound to occur within a fixed time. The common law courts have held that such a devise means an indefinite failure of issue, and that the grant is void unless there is something else to indicate that a definite failure of issue was intended.

The limitation over on the condition of the grantee dying without issue, when the grant to the first taker is a fee, is held to create an estate tail, as is also the case when the first taker is given a life estate, in the one case the grant being restricted, and in the other enlarged, so that the estate over thereby becomes a remainder, and the rule against perpetuities is not violated, since the tenant in tail has the right to bar the entail at any time, and thereby convert the estate into a fee simple.[64]

265. **Same subject.**—Where the will contains a proviso that if the devisee dies without issue, or issue him surviving, or the like expression, there is some conflict as to the construction to be placed upon the language used. Thus in Edwards v. Edwards,[65] the Master of the Rolls held that the expression "dying without issue," in such a case meant the dying of the grantee within the lifetime of the testator without issue; that is, the expression meant the same as if the testator had said, I give lands to A and if he dies to B, the intention being that if A died before the will took effect—before the testator's death—then the estate should go to B. Some American authorities follow this case. But in England, the

[64] Eichelberger v. Barnitz, 9 Watts 447 (Pa.); Tator v. Tator, 4 Barb. 431 (N. Y.).

[65] 15 Beav. 357 (Eng.).

rule is now settled that a gift to A, and provided A dies without issue, to B, means that if A dies at any time without issue, the estate goes to B, that is an indefinite failure of issue, and not a definite failure of issue by dying in the lifetime of the testator. And this is the weight of the American authorities.[66] To avoid this construction by the courts upon the words "dying without issue," New York State adopted a statute which has been followed in Virginia, Indiana, Michigan, Missouri and perhaps other states, providing that when a remainder shall be limited to take effect upon the death of any person without heirs, or heirs of his body, or without issue, the words heirs or issue shall be construed to mean heirs or issue living at the death of the person named as ancestor.[67] The court held that this statute meant that if a grantee died without issue at any time before or after the testator, the estate went over.[68] But notwithstanding this statute the New York courts have turned back and hold that this expression means that if the donee or grantee dies without issue before the testator dies, then the estate goes over, otherwise not.[69]

266. **Conditions.**—It is settled in this country that conditions are not within the rule against perpetuities, as in case of a gift to A and his heirs but on a condition subsequent to B. This rule gives large

[66] Smith v. Kimball, 153 Ill. 368, LEADING ILLUSTRATIVE CASES; Ingram v. Soutten, 7 H. L. Rep. 408 (Eng.); Briggs v. Shaw, 9 Allen 516 (Mass.).

[67] Rogers v. Rogers, 3 Wend. 503 (N. Y.).

[68] Goodell v. Hibbard, 32 Mich. 47; Sherman v. Sherman, 3 Barb. 385 (N. Y.).

[69] In re New York, L. & W. Ry. Co., 105 N. Y. 89; Schermerhorn v. Cotting, 131 N. Y. 48. See Gray, Perpetuities (2nd ed.), § 251.

opportunity for blackmail and has not been followed in England, where conditions are subject to the rule of perpetuities. The best reason for the American rule is that there is always someone in being who, by uniting in a deed, can convey the fee simple to the land affected by the condition. Suppose A grants the estate to B upon certain conditions; the next day, or any time, B can go to A and say, I want to be released of that condition, and A has the power to release him from the operation of the condition, giving him an absolute fee simple. It is not required that the condition must be performed within lives in being and twenty-one years afterwards, since there is always someone in being who by uniting in the deed can convey a perfect title. But where the estate is granted upon a conditional limitation, there is no one in being who can join and pass a perfect title, therefore the event must be one which will happen within the period fixed by the rule governing perpetuities.

CHAPTER XXIV.

THE RULE AGAINST PERPETUITIES APPLIED TO CHARITIES.

267. **What charitable gifts subject to rule.**—It is sometimes said that the rule against perpetuities does not apply to charities. But the rule is a rule to prevent estates from being marketable, and in that sense charities are not subject to the rule, as interests in charitable trusts are not alienable except by order of court or by the legislature. It does not by any means follow, however, that a gift to a charity to begin at a future time beyond the period of the rule will be good. It has never been doubted that a gift to a charity and then over to an individual will be too remote where it may begin at a period beyond the limitations of the rule against perpetuities. So where there was a bequest to trustees for an almshouse and power was given to the managers to sell and the surplus rent on sale was to go to S and C families till they became extinct and then over on a trust to B, the gift over is void, as it may take effect beyond the period limited by the rule.[70] So where there was a devise to trustees in trust for endowing an additional church at A and there was not any answering the description, the

[70] Commissioners v. DeClifford, 1 Drury & Warren 245 (Irish). See Proprietors of Church of Brattle Sqr. v. Grant, 3 Gray 142 (Mass.), 63 Am. Dec. 725, LEADING ILLUSTRATIVE CASES.

court suggests that it is very doubtful whether the court will hold the fund forever and the correct course is to inquire whether the fund can be so applied.[71]

In another case the testatrix devised lands to the trustees directing them to convey the land for a church if the trustees were satisfied any society of a certain faith might be able to erect and maintain a church without getting into debt. This was held void as creating a perpetuity, for there was no limitation as to the time in which the application was to be made and no certainty that such an event would ever occur.[72]

268. **Limitation to charities.**—Where there is a gift to charity on a condition which must occur within twenty-one years, then it is distinctly a condition and it would go to the heirs until that time. On the other hand, if it is on a contingency which might be void as beyond the rule against perpetuities, then it would be too remote and the charity would not take. Where a gift is from an individual over to a corporation or person on a charitable trust there is no question that the rule against perpetuities applies. Where a trustee who holds property in trust for an individual is directed to hold it on a charitable trust, the trust is considered an entity and the change of trust is within the rule against perpetuities.

269. **Limitation after charitable gift.**—A limitation over on a breach of a condition where the lim-

[71] Sinnett v. Herbert, L. R. 7 Ch. 232 (Eng.).
[72] Jocelyn v. Nott, 44 Conn. 55.

itation may take effect at a period beyond the rule against perpetuities is void. Thus if a devise of land be made to trustees to hold for a charitable trust with a limitation over in case the property should be diverted from the purposes of the trust, this is void because of the indefiniteness of the event upon which the estate is to arise.[73] So in any case where there is a gift to a charity and on a contingency to an individual beyond the rule against perpetuities, the gift over to the individual is bad.

270. **Limitation from one charity to another.**— The only exception to the rule is where there is a change from one charity to another. So where property was given to Reading for charity and if the charity was not carried out then over to the city of London for charitable purposes, the court holds that this is not opposed to the rule against perpetuities.[74] This case has been subject to some criticism and will not necessarily be followed in any jurisdiction where the question is not well settled. But it may well be said in support of the English rule that the rule against perpetuities is intended to prevent the taking of land out of commerce and that charities seem to be a recognized exception to that desire, that by the nature of charities they may all depend on things happening after the limitations in the rule against perpetuities. Take, for example, the ordinary case of a trust to the men of a certain family attending a certain college. In this case those young men who attend that college from that family in any

[73] Wells v. Heath, 10 Gray 17 (Mass.).
[74] Christ Hospital v. Grainger, 1 Mac. & G. 460 (Eng.).

succeeding generation will still be entitled to the fund.

271. **Gift to corporation to be formed—Cy pres.**—Where there is a gift to an association or corporation for a charitable object, which association or corporation is not in existence, the courts have been very quick to construe this as a present gift to the corporation to be organized in a reasonable time. If the gift is to the charity on a contingent event, and the happening of the event may be too remote, then the gift will be void. And this theory that it is a present gift is the only way to save the charity. The theory depends upon the doctrine of cy pres which is in force in most of the states in this country. The doctrine of cy pres may be stated to be in short this, that where the exact purpose of a charitable gift cannot be carried out the court will rearrange the gift to satisfy the general intention of the testator. The cy pres doctrine in this country is favored today more than formerly and is likely to be followed where the matter is still an open question.

272. **Trust for indefinite period.**—So a limitation in trust where property is to be managed or held for an indefinite period for any purpose not recognized as a public charity, is void as opposed to the rule against perpetuities. For example, trusts for the benefit of the employees of a banking institution[75] or for keeping a homestead in repair[76] or for keeping the testator's house open for the reception and entertainment of ministers, or for keeping the

[75] Siedler v. Syms, 56 N. J. Eq. 275.

[76] Bartlett Petitioner, 163 Mass. 509 (good only so far as authorized by statute).

testator's clock in repair,[77] or for continuing the testator's business,[78] or for maintaining a burial place,[79] are all void, as opposed to the rule against perpetuities.

[77] Kelly v. Nichols, 17 R. I. 306.
[78] Hamlin v. Mansfield, 88 Me. 131.
[79] Coit v. Comstock, 51 Conn. 352.

CHAPTER XXV.

THE RULE AGAINST PERPETUITIES APPLIED TO CLASSES.

273. **Definition of class.**—A gift or devise may not be made to a particular person, but to a class of persons. A gift is said to be to a class of persons when it is to all those who shall fall within a certain category or description denoted by a general or collective formula, and who, if they take at all, are to take one divisible sum in certain proportionate shares. Thus a devise to the children of A, or to the children of A who shall arrive at the age of twenty-one, is a devise to a class.

274. **Class treated as a whole.**—The class must be treated as a whole in testing the validity of a gift to it. In an English leading case, for example, there was a devise to trustees for life and then in trust for all of the children of M reaching twenty-one and the issue of such of them as died under twenty-one leaving issue who reach twenty-one or die under twenty-one leaving issue, such issue to take the parent's share.[80] The testator died in 1831 and M died in 1869; five of the children of M reached twenty-one, some of whom died in her lifetime, some died under twenty-one leaving no issue, and none died under twenty-one leaving issue. The court holds that the words applied to the grandchildren

[80] In re Moseley's Trusts, 5 App. Cas. 714 (Eng.).

of M, "which issue shall reach twenty-one," are words of description and not of condition and so the gift is too remote and as there is no gift to issue as such it cannot be separated from the gift to the children. It was claimed that the shares might be separated, but the court remarks that at the death of the testator the father was unmarried and it was absolutely uncertain whether he would ever have a child who should reach twenty-one. The whole class might have consisted of those afflicted by the vice of remoteness at the death of the life tenant. The court might say that the class could not exceed a certain number, but it could not tell how few it might be.

This case lays down the principle that the maximum and minimum of the number of shares must both be determined within the rule against perpetuities. The court refuses, where there is a bequest in favor of a whole class, to make the bequest what it was never intended to be, namely, a series of particular legacies to particular individuals. The rule is that the vice of remoteness affects the class as a whole if it may affect an unascertained number of its members.

275. **The situation at the death of the testator will govern.**—To determine whether a devise to a class is good or not, as regards the rule against perpetuities, the situation at the time of the death of the testator, that is, the time the will takes effect, is to govern. So that if all the members of the class are to be ascertained, and the share of each to be determined within the time limited by the rule, from

the death of the testator, the devise is good; if not, it is bad. Suppose a devise to A and his issue, and if A dies without issue, to the issue of B who shall attain the age of twenty-one. The devise is good because B's youngest son must attain the age of twenty-one within twenty-one years from B's death. A limitation to grandchildren, or children of a living person, as a class, when they shall attain an age greater than twenty-one years, is bad for remoteness, unless someone in the class is of the required age at the testator's death.[81]

When the limitation is made in a marriage settlement to children beyond the term of twenty-one years, the limitation is too remote. Thus if the settlement provides that the property shall be used for the benefit of the father or mother during their lives, and then to the children who arrive at the age of twenty-two, this is bad for remoteness, unless at the death of the first taker there is a child of the required age. When the devise is confined to the grandchildren who are in being at the testator's death, it is good at whatever age they take. The reason for this is, that the devise is given to a class that is in being and known and determined, and as they are in being, the limitation is simply for lives in being and within the rule.

When the gift is to such grandchildren, or other class as shall reach a particular age, and one or more of that class has reached the required age at the time of the testator's death, the class is closed, and the devise is not too remote. But no person can be

[81] Sears v. Putnam, 102 Mass. 5; Hall v. Hall, 123 Mass. 120.

included in the class who is not in being at the time of the testator's death.[82]

276. **Same subject.**—When a legacy is to children or grandchildren as a class after the prior estate, the gift is to the members of the class in existence at the time of the death of the first taker, and not at the death of the testator. Suppose A makes a will giving to his son John certain land for life, remainder to John's children; and when the testator dies John has two children. Here the children that take are not the children in existence when the testator dies, but the children in existence when the estate is to be distributed, that is when John dies, so that all of John's children will take at his death; while if the grant had been to John's children who arrive at the age of twenty-five, and one of his children had been alive and of the required age at the death of the testator, the class would have been closed, and those two children would have taken.[83] This distinction is important, for if it is desired to provide for unborn children of a child of the testator at the testator's death, it cannot be accomplished by a provision that the property shall go to "my son's children," since this is a gift to those children of the son who are in existence at the time of the testator's death and does not include those who may be born thereafter.

When the gift is to the children of A who shall reach the age of twenty-one, and if any child of A shall die under the age of twenty-one leaving issue,

[82] Attorney General v. Mayor of Brecon, 10 Ch. Div. 204 (Eng.).
[83] 1 Brown's Ch. Cas. 542; 1 Cox 68; L. R. 10 Ch. Div. 267 (Eng.).

to such issue on attaining the age of twenty-one, the latter taking the parent's share, there is a gift to a class composed of the children and grandchildren of A at twenty-one years of age. The maximum number of shares into which the gift may be divided is the whole number of A's children, but if A's children are under the age of twenty-one, the minimum number cannot be known, for such children may die before reaching the age of twenty-one, leaving issue who will not reach the age of twenty-one within the limitation, so that the devise is bad as contravening the rule against perpetuities. Therefore, when a devise is made to a class, the members of that class must be determined within the time fixed.[84]

277. **Rules for determining whether a devise to a class is invalid.**—To ascertain whether or not a devise to a class is bad, the following rules have been formulated:

1. An executory devise is bad unless it be clear at the time of the death of the testator that it must, of necessity, vest in someone, if at all, within lives in being and twenty-one years thereafter.[85] Where the gift is made to a class and the present members of the class are all within the rule but they may all die and leave only those born who would take beyond the period allowed by the rule, then the gift is bad and it may be said in general that a limitation to a class whose members *may* be outside the rule against perpetuities is bad.

[84] Cholmondeley v. Clinton, 2 Merivale 171 (Eng.); Seaman v. Wood, 22 Beav. 591 (Eng.); Webster v. Goddington, 26 Beav. 128 (Eng.).

[85] Lord Dungannon v. Smith, 12 Cl. & Fin. 546 (Eng.).

2. If the devise is to a single member constituting the class, who may possibly be a person excluded by the rule against perpetuities, then no person whatever could take under the devise, because the testator has expressed his intention of including all, and not to give to one excluding the others.[86]

3. When the devise is to a class of persons, and any of that class may have to be ascertained at a period too remote, the devise fails, for the reason that the testator intended that the amount of each member's share should be ascertained by dividing the whole sum given, by the number of members in the class. This is an important rule. As where a gross sum is given to A's children who shall arrive at the age of 25, and you cannot ascertain how many will arrive at the age of 25 within the time limited, the whole will fails because you do not know what each of them will get.[87]

4. When the gift is made to a class, but a definite and fixed sum is given to each member of that class, and it cannot be increased or diminished by the increase or diminution of the members of the class, the gifts to each are separable, and those falling within the limit of the rule are good, the others bad. Thus if $20,000 is given to each of five persons in a class when they arrive at a certain age, here each gift is separate, so that each member of the class stands on his own footing, and the devise may be good as to some and bad as to others.[88] In the case of Wilkin-

[86] Proctor v. Bishop of Bath & Wells, 2 H. Bl. 358 (Eng.).

[87] Lord Dungannon v. Smith, 12 Cl. & Fin. 546 (Eng.); Cholmondeley v. Clinton, 2 Merivale 171 (Eng.).

[88] Boughton v. James, 1 H. L. Cas. 406 (Eng.).

son v. Duncan[89] there was a bequest of $2,000 to each of the testator's daughters, who should arrive at the age of twenty-four. It was held good as to the daughters who had arrived at the designated age within the rule.

5. If, when the devise takes effect, there is a member of the class who can take, the class is closed and the devise is not bad for remoteness, although the gift may not be divided within the time fixed by the rule.

278. **Rules for determining whether or not the class is closed.**—Whether or not the class is closed when the devise takes effect, depends upon certain rules of construction, as follows:

1. When there is a general devise to children or other persons as a class, the class includes only such persons who are in being when the testator dies, that is, when the will takes effect.[90] For example, in the case of Richards v. Baker[91] the testator made a will giving lands to his widow for life, remainder to W. M., charged with $400 to be paid within six months after the death of his wife for all the children of his sister Catharine, share and share alike. After the death of the testator another daughter was born to Catharine. The court held that such child did not take, but that only the children in being at the time of the testator's death were entitled to take. This rule does not exclude children born after the will is made and executed and before

[89] 30 Beav. 111 (Eng.).

[90] Hill v. Chapman, 1 Ves. Jr. 405 (Eng.); Hills v. Simonds, 125 Mass. 536.

[91] 2 Atk. 121 (Eng.).

the testator's death, but does exclude the children born after his death.

The general principle is that where a gift is made to all the children it shall not extend to after-born children, but where it is given with any suspension of the time so as to make the gift take place by a fair or even by a strained construction at a future period, then such children shall take as are living at that period. This is a rule of convenience to prevent indefinite postponement of future interests.

2. When the devise is to take effect after the termination of a prior estate, only persons in being answering the description at the expiration of the prior estate are included. Where an estate is devised to A for life, remainder to his children, there is no trouble at all. But suppose the estate is given to A for life, remainder to B's children, and A and B are both alive. At the time of the testator's death, B has two children; at the time of A's death, B has four children, and afterwards has two more children born to him. In such a case the class is closed when A dies, and the four children who are then in existence take the devise, and those born afterwards do not take. In the case of Hill v. Simonds[92] the testator left his estate to two sons, providing that if the sons died without issue, the estate should go to the children of their two brothers and one sister, share and share alike, remainder to their issue. Both sons died without issue, and at their death there were twenty-three nephews and nieces. The court held that each of these took

[92] 125 Mass. 536.

a vested interest upon the death of the uncle, and that children born after that did not take.

3. When the gift is to a class generally, payable at a certain period, as to children when they arrive at a certain age, all children in being when the first child arrives at the designated age are let in; after-born children are excluded. So in the case of Attorney General v. Bowyer[93] the bequest was to the children of A when they severally arrived at the age of sixteen, and at the testator's death there were six children, the oldest being past fifteen, but not sixteen. Three children were born to A after the oldest arrived at the age of sixteen. The court held that the six children that were in existence at the time the oldest one attained the age of sixteen would take, and that those born afterwards were excluded. In general, when there is a gift for such of the children of A as shall attain a specified age, only those who are in existence when the first of the class attains the specified age can take, and all after-born children are excluded. This is a rule of convenience laid down in many cases.

4. When the devise is given to each of several persons who shall succeed each other in some certain position, in office, for instance, none except those in being at the death of the testator can take.[94]

These rules of construction have been adopted by the courts to determine the intention of the parties who use certain words and phrases, by declaring in advance what meaning shall be given them.

[93] 3 Ves. 730 (Eng.).
[94] Vigers v. Pike, 8 Cl. & Fin. 562 (Eng.).

279. **Where members of class must necessarily be within the rule.**—If the number from which the contingent class is drawn is limited to lives in being, then it is good no matter what the contingency is, so where there is a gift to all the children of a living person who, being sons, shall attain twenty-five or daughters shall attain twenty-one or marry, this gift is good, as this is a contingent interest in those who are at the age of the testator under twenty-five. A gift to all testator's grandchildren who reach twenty-one is a present gift, and a grandchild dying before he reached that age would lose his share. On the other hand a grandchild born after the testator's death ought to take. In such a case the time of distribution is the test of membership of the class.[95]

[95] Picken v. Matthews, 10 Ch. Div. 264 (Eng.).

CHAPTER XXVI.

THE RULE AGAINST PERPETUITIES APPLIED TO POWERS.

280. **In general.**—A power is an authority by which one person enables another to do some act for him. The most common instance of a power is where A by will gives property to B for life with power in B to appoint the remainder as he pleases.

The person who makes the instrument creating a power is the donor of the power. The person who has the right to use the power is the donee. In the above case A is the donor and B the donee. A general power is one where the donee has the right to appoint to whomever he pleases, including himself, while a special power is one in which the donee is restricted to an appointment to particular persons only.

Two things are necessary to make a valid appointment under a power: in the first place, that the power is one which must become operative within the rule against perpetuities, and in the second place the appointment itself must be within the rule. The mere possibility that a void appointment might be made under the power will not invalidate an appointment which satisfies the rule.[96] To state the proposition in another form: where a power of appointment is given, if by the terms of the power it can be exer-

[96] See Brown v. Columbia Finance & Trust Co., 123 Ky. 775, 97 S. W. 421, LEADING ILLUSTRATIVE CASES.

cised at a time beyond the limits of the rule it is bad,[97] but the fact that by its terms an appointment might be made which would offend the rule does not affect the validity of the power.[98] A power of appointment given to a living person is generally good since it must be exercised in the donee's life time. Yet a power to appoint to a class, which may not be ascertained until a period too remote, is bad, for the appointment cannot take effect within the required limits.

281. **Donee of general power treated as owner.**— A general power is equal to a limitation in fee, and therefore whatever estates may be created by a man seized in fee may be created under a general power of appointment, and the execution of the power is the date from which the period of the rule against perpetuities should be reckoned.[99]

A general power of appointment can be used by giving the appointee a power, and where one has a power to appoint by deed or by will he may appoint to himself. So where the appointee was not born at the time of the creation of the power the appointment may still be good. Where the donee of the power has practically a fee, and could have appointed to himself, the court treats it as two appointments, first to the donee himself, and then over. This rule only applies where the donee had the right to appoint to himself. Suppose A leases property to B for life and then as C may by deed or will appoint. There is

[97] In re Lawrence's Estate, 136 Pa. St. 354.
[98] Woodbridge v. Winslow, 170 Mass. 388.
[99] Genet v. Hunt, 113 N. Y. 158.

a great difference of opinion in the cases as to the exact nature of C's interest. The technical theory is that C has no interest in the property, but is a mere agent to dispose of it, and never gets title, that the wife never gets dower, and his appointees take through the will of the original donor. On the other hand, the popular theory is that C is really the owner in remainder of the property, as he may dispose of it to any persons he sees fit, including himself. So for purposes of taxation he is commonly regarded as the owner, and his creditors may take the property. And as regards the rule against perpetuities, a general power of this kind is treated the same as ownership.[1]

282. **Whether donee of power to leave by will is treated as owner.**—There is considerable doubt where there is a general power to leave by will whether its remoteness is reckoned from the date of the creation of the power or of the will exercising it. For example, where A gave funds in trust for his daughter B, and as B should by will appoint, and B appointed by will to her daughter and to her children who reach twenty-one, the court held that this general power to appoint being exercisable only on her death, did not give her an absolute interest in it. So the appointment must be taken to be an interest created by the will of A, and hence interests to the grandchildren are void.[2] Here it will be noted that the donee of the power cannot appoint to himself. To be sure, the donee may contract to leave by will,

[1] In re Pryce, 130 L. T. 415 (Eng.).
[2] In re Powell's Trusts, 39 L. J. Ch. N. S. 188 (Eng.).

but such an agreement is not so marketable as the absolute ownership. The practical consequence of sustaining such an attempted limitation would be a series of trusts and powers and the consequent tying up of property.[3]

This view has been ably and fully criticised in 26 Harvard Law Review 64, by A. M. Kales. Mr. Kales remarks that the donee of a general power to appoint by will is practically the owner, as he can at that time do all that any owner could do. He cites as opposed to Powell's Trusts three later cases given in the note.[4]

283. **Date for reckoning validity of appointment under special power.**—In the case of a particular power of appointment, however, the donee does not act as the owner of the fee, but as the representative of the donor, and the appointment is referred back to the instrument by virtue of which it is made, and it is tested as regards remoteness by the application of the rule as if the estate had been limited in the instrument creating the power.[5] So where there is a limitation to A for life and on his death as he may appoint among his issue and he does appoint to his grandchildren who reach twenty-one, that is void, as the rule is that the power is considered as dating from the time of its creation.

284. **Power of sale.**—A power of sale is not void even though its exercise is not expressly confined to

[3] This is the general American view.

[4] Rous v. Jackson, 29 Ch. Div. 521 (Eng.); In re Flower, 55 L. J. Ch. 200, 53 L. T. 717, 34 W. R. 149 (Eng.); Stewart v. Babbington, 21 Irish L. Rep. 551 (Eng.). See, however, Mifflin's Appeal, 121 Pa. St. 205.

[5] Albert v. Albert, 68 Md. 352; Fargo v. Squiers, 154 N. Y. 250.

a period within the limits of the rule, but an express direction that property shall be sold at a time beyond this period is void.[6] So a power of sale may be valid although upon the exercise of another power it may be exercisable at too remote a time. So where a testator left property to trustees to pay the income to his children for life, each child having a power to appoint to his or her prospective wife or husband for life, and upon the death of the last surviving child and of such wives and husbands as should take, the trustees were directed to sell. None of the children ever exercised the power, and the court holds that the trust for sale is valid.[7]

285. **Where description might be remote but actual facts show the contrary.**—The appointment may be void on its face but valid when applied to the facts. For example, where L. R. by will devised to trustees for the daughters for life and as they may by will appoint, and M. S., a daughter, did appoint by will to her children for life and as they may appoint, but all her children were in fact born in the life of L. R., the court holds that, as under this description there might have been after-born children, the limitation to the children of M. S. is bad. If the gift had been to the children by name it would have been good.[8] This case is opposed to the English law and has been severely criticised, and it is doubtful how far it is law in this country. It may be suggested that "the children" in the case of a will

[6] In re Johnston's Estate, 185 Pa. St. 179.
[7] In re Davies & Kent's Contract, 1910, 2 Ch. 35 (Eng.).
[8] Smith's App., 88 Pa. St. 492.

means particular individuals at the date of the will, and that, where these answer the description, the gift to those actually born in the life of the testator should be upheld, whatever might have been the possibilities if they had not been born within his life.

286. **Same subject.**—In a recent case there was a will devising to A for life with power to appoint to her children or descendants. The daughter appointed by her will to her children for their lives with remainder in fee to their heirs living at their death. All the children of the daughter were actually born in the lifetime of the testator, but nevertheless the court holds the appointment void for remoteness.[9] This case follows Smith's Appeal,[10] but seems open to criticism, and is opposed to the English view.[11] It does not seem right to prevent the donee from speaking validly as to existing conditions when it might be said that the same limitations would be good with the addition of the stipulation that the existing state of facts was a condition precedent to the limitations. This case should be a warning to attorneys so to draft wills or deeds in appointments under a power as to state clearly that the objects of the appointment can only take where they fall within the rule against perpetuities.

[9] Brown v. Columbia Finance & Trust Co., 123 Ky. 775, 97 S. W. 421, LEADING ILLUSTRATIVE CASES.

[10] 88 Pa. St. 492.

[11] Morgan v. Gronow, L. R. 16 Eq. 1 (Eng.).

CHAPTER XXVII.

THE RULE AGAINST PERPETUITIES APPLIED TO MODIFYING CLAUSES AND SEPARABLE LIMITATIONS.

287. **Modifying clauses.**—There is a class of cases where an absolute gift is given outright and then in another clause limitations over are added which are void, and the courts have stated the doctrine that in that case the limitations over may be disregarded and the original absolute gift stand notwithstanding the rule against perpetuities. So where there was a gift[12] of property to make a division of it between the children of the testator on the death or second marriage of the widow, but there is a separate clause providing that the shares of the daughters are to be invested for their children when they reach twenty-five, the court holds that the interest in the daughters is absolute, and the attempted restriction must be considered void and is so held.

This is a case where there was an absolute interest given to the daughters and an attempted restriction on that absolute interest, which not having become effectual, the whole interest remained according to the original gift. This rule will not be applied unless there is an absolute gift independent of a modification.

So in cases where there is only a trust for the benefit of beneficiaries for life with remainder over,

[12] Ring v. Hardwick, 2 Beav. 352 (Eng.).

which remainder is void, the beneficiaries only take life interests.[18]

288. **Clause against anticipation.**—So the modifying clause may be rejected in the case of settlements on married women with a clause against anticipation. If there is a clause against anticipation attached to the estate itself according to the better view that clause will be void, as such a clause cannot be attached to an absolute interest, and the fact that it may be also too remote is immaterial. Therefore it will not suffice to invalidate the interest given. There is much confusion in the authorities on this question which we have considered under restraints on alienation.

289. **Separable limitations.**—When gifts are made to several persons by one description, and the gift to one is not affected by the existence or non-existence of others, the gifts may be separable, and if modifying clauses are too remote when applied to the gifts of some they will be disregarded, and will be regarded where they are not too remote. Where there are different contingencies for a gift over if all must happen within the rule against perpetuities, then all are good, and if none must happen within the rule then all are bad, but if some must happen within the rule and some not there is some uncertainty as to the law.

A trust for sale, although it is a vested interest, may be nevertheless assailable as a perpetuity, as where one of the donees might appoint to a person not born at the death of the testator, and the trust

[18] Whitehead v. Rennett, 22 L. J. Ch. 1020 (Eng.).

might not have become operative within the required limits. But the court may separate the limitation into two, one of which trusts is to take effect on the death of the survivor of the children in case no appointment is made. Such a limitation would be valid, and is an exception to the rule that a gift expressed in one limitation cannot be divided unless separable in its terms.

CHAPTER XXVIII.

CO-TENANCY IN GENERAL.

290. **Joint tenancies distinguished from tenancies in common.**—In joint tenancy each co-owner is possessed of the whole subject to the others' interests; tenants in common hold distinct, although undivided, parts. The great practical difference between the two forms of collective ownership is that on the death of a joint tenant the survivors hold the property free of the interest of the deceased, while on the death of a tenant in common the property passes to his representatives just as would any other property.

291. **History of presumption.**—Of these forms, tenancy in common is the more in accord with ancient custom. And it seems not unlikely that down to the time of Bracton a conveyance to several, in the absence of special facts, created a tenancy in common. Such an interest in real property imposed upon each tenant the incidents of tenure as to his share; and the courts came to feel that in construing limitations as tenancies in common they were not benefiting the holders of the property. The general rule in favor of such construction accordingly fell; and as it was at first replaced by no other, the judges for a time probably applied no definite principle to the cases as they arose. But when Littleton wrote, the new general rule had developed, that a conveyance to two or more created a joint tenancy unless

the instrument itself showed an intent that the enjoyment be several.

The substantial disappearance of the incidents of tenure took from joint tenancy its claim to the favor of the judges. And although the rule of Littleton held its own alike for real and personal estates and for choses in action (contract rights), the courts became increasingly liberal in finding words of severance. This liberality was somewhat more marked in equity than at law, and perhaps also more marked, both at law and in equity, as to conveyances by use or devise than as to conveyances by the common law methods, where the strict technical rules of the common law prevailed.

292. **Presumption in this country.**—In this country, whenever interests are acquired to the same estate by the same act or instrument, and there is no indication to the contrary, they will hold as tenants in common. The common estate in this country today where there are various interests in land is a tenancy in common. The strict right of survivorship incident to joint tenancy has caused it almost everywhere to be superseded so far as possible by statutes favoring tenancy in common. In one or two jurisdictions the courts without legislative aid have either limited or denied the English presumption in favor of joint tenancies; and in Connecticut, which accepted the presumption, the right of survivorship has been rejected. For the most part, however, the courts of this country have followed the English decisions. But legislation has now everywhere either reversed the English presumption or abolished the

right of survivorship, or altogether done away with joint tenancies.

293. **Conveyance to several and their representatives.**—The courts have at various times raised and left unsettled the problem of the effect of a conveyance to A and B, "their executors, administrators and assigns." In a recent English decision[14] this form of words is held to be indistinguishable from a transfer to A and B without more, and accordingly to create a joint tenancy. The result is unfortunate, as the purchasers of the term did not contemplate a right to the whole in the survivor. To attain its conclusion the court is driven to regard the naming of the personal representatives as for all purposes surplusage. But it is true that the purpose of naming the executors was the limitation of the estate granted, and not the determination of the type of collective interest created; so that the doctrine of a technical decision reduces itself to a highly technical rule in England, that words of severance must profess to be such. It is probable that nowhere in this country, at least as to interests in land, would this decision have been reached.

294. **Tenancy by entirety.**—Tenancy by entirety of the husband and wife is founded on the legal fiction that husband and wife are one, and that these two persons hold the estate as one legal person, and on the death of either the same estate continues in the survivor. It is agreed, for example, that neither one can possibly alienate the estate in such a manner as to bar the survivor.

[14] Goddard v. Lewis, 101 L. T. 528 (Eng.). 1909.

In a recent New York case, at an execution sale, the wife bought her husband's interest as tenant by entirety with her, and the court holds that the entire estate thereby vested in the wife. Since she had already a right of survivorship which could not be sold by him, on purchasing his interest she then became vested with the entire estate.[15]

295. **What property may be held in co-tenancy.**—All property that can be held separately can be held by tenancy in common or by joint tenancy. So, mining and water rights may be held in common or any rights appurtenant to land, like a right of way established for the common use of the abutting owners, may be held in common. So equitable as well as legal estates may be held jointly or they may be held by tenancy in common.

296. **Divisions not creating co-tenancies.**—A conveyance dividing land into separate parts conveying one part to each grantee creates an estate in severalty and not an estate in common. So where the owner sold all the standing timber on the land, this transaction does not make the parties tenants in common of the land or of the timber, but land and timber are held separately by them.[16] Where various lots in a deed are in one parcel and are conveyed each to a separate individual each person has an absolute title in each one. But where there was a conveyance to A and B and C of two lots described by metes and bounds of the entire lot containing

[15] Thornburg v. Wiggins, 135 Ind. 178, 34 N. E. 999, LEADING ILLUSTRATIVE CASES.

[16] Dexter v. Lathrop, 136 Pa. St. 565.

after the description the words "it is understood that A is to have No. 70 and B and C No. 72 and said cottage" it is held that the parties take a tenancy in common and that the quoted words added are too vague to change the result. These words might refer as well to occupancy as to legal title.[17]

[17] Dallagher v. Dallagher, 171 Mass. 503.

CHAPTER XXIX.

TENANCY IN COMMON.

297. **Definition.**—"Tenants in common are such as have a unity of possession but a distinct and several title to their shares. The shares which tenants in common hold are by no means necessarily equal. Thus one tenant in common may be entitled to one-third or one-fifth, or any other proportion of the profits of the land, and the other tenant or tenants in common to the residue. So, one tenant in common may have but a life or other limited interest in his share, another may be seized in fee of his, and the owners of another undivided share may be joint tenants as between themselves, whilst as to the others they are tenants in common. Between a joint tenancy and a tenancy in common, the only similarity that exists is therefore the unity of possession. A tenant in common is, as to his own undivided share, precisely in the position of the owner of an entire and separate estate,"[18] and may compel partition of the undivided land, and thus come into full control of his interest in severalty.

298. **Creation by grant.**—Where persons have contributed in unequal shares toward a purchase and the conveyance is made to them they are tenants in common and not joint tenants. So a conveyance

[18] Williams, Real Property (6th ed.), p. 137; Carver v. Fennimore, 116 Ind. 236, LEADING ILLUSTRATIVE CASES.

of an undivided interest makes the grantee a tenant in common with the other owners, where the sale is voluntary and also where it is involuntary as by a sheriff's sale or mortgagee's sale of the interest of the tenant in common, or where the tenant in common makes an assignment for creditors. The purchaser in such case succeeds to the rights of the tenant in common without actual delivery of possession and occupies the same position as to the property which the original tenant had, with all his rights and liabilities.[19]

299. **Creation by descent.**—Tenancy in common may arise by descent as well as by will or by deed, as if an owner dies intestate his heirs are tenants in common of the property. So where one of several tenants in common dies intestate his interest descends to his heirs as tenants in common with the other heirs of the original co-tenant, and where a wife owns property with her husband and dies her share goes to her heirs as tenants in common with the husband.[20]

300. **Widow's dower.**—A widow is not at common law a tenant in common with the heirs of the property until dower is assigned.[21] This rule does not apply in states where the widow has an immediate right of entry on the death of the husband. Where the widow elects to take a share of the property in lieu of dower she thereby becomes a tenant in common of the property with the heirs or devisees.[22]

[19] Brown v. Graham, 24 Ill. 628.
[20] McDougal v. Bradford, 80 Tex. 558.
[21] Grubbs v. Leyenbecker, 153 Ind. 348.
[22] Wigley v. Beauchamp, 51 Mo. 544.

301. **Creation by two grants of same property.**—The situation has arisen of a grant of the same property to two persons at the same time by separate deeds and the courts hold that these also hold as tenants in common.[23] The question might possibly arise in a case of mortgages made of the same land at the same time to secure separate debts.

302. **Grant of acreage out of large tract.**—Tenancy in common may also arise where a grantor owns a large tract of land and conveys a certain number of acres out of it without designating just what land is covered by the deed, and the undivided interest of the tenant in common will be measured by the proportion of the acreage granted from the tract as compared with the area of the whole tract.[24] So where the grantor reserves in the deed a certain interest in the property conveyed this will render the grantor and the grantee tenants in common of the whole tract.[25]

303. **Partnership land.**—Where real estate is purchased by partners for partnership purposes with partnership assets such estate would be held by the owners as tenants in common with all the incidents of partnership assets. This is so even though title is taken in the name of one partner, as a trust in favor of the partnership is thereby created. The partnership land is held as a tenancy in common in the first place, on account of the difference in the amount of the interest of the partners: in the second place, as

[23] Young v. DeBruhl, 11 Rich. 638 (S. C.).

[24] Jackson v. Livingston, 7 Wend. 136 (N. Y.); Small v. Jenkins, 16 Gray 155 (Mass.).

[25] Payne v. Parker, 10 Me. 178; Wheeler v. Carpenter, 107 Pa. St. 271.

partnership property it is like stock in trade to which the principles of survivorship do not apply. There is a lien on partnership real estate in equity for payment of partnership debts even although the land is in the name of one partner. The members of a firm are tenants in common of firm real estate. Each may convey or encumber his undivided interest. The dissolution of a partnership does not of itself destroy the co-tenancy of the partners in the partnership property, but the partnership continues for the purpose of settling up the firm's business. The bankruptcy of one partner creates in his trustee with other partners a tenancy in common of partnership property.[26]

304. **Incidents of tenancy in common.**—The only unity required in a tenancy in common is that of possession. The other unities incident to a joint tenancy, as unity of the acquisition of title, of the shares, and of the quantities of the estate, may be lacking. For example, one of the co-tenants may be a life tenant and the other a holder in fee. One may have purchased and the other taken by descent. One may hold a quarter and the other a third of the property. Interests by tenancy in common are subject to rights of curtesy or dower.

305. **Mutual rights.**—There is a universal fundamental rule that one tenant in common cannot maintain trespass against another so long as both retain possession. Of course, one can maintain trespass against the other for actual eviction from the premises, but nothing short of this is sufficient. The

[26] Loubat v. Nourse, 5 Fla. 350.

possession of one tenant in common is presumed not to be adverse, but is held to be for the benefit of other tenants in common, although of course disseisin by one tenant in common of another may be shown by evidence of long continued open and notorious acts of adverse possession, especially where there is no accounting for rents and profits. A tenant in common has a right to alienate his share or any portion of it, but he cannot convey his interest in any particular portion of the estate described by metes and bounds, as such a conveyance would injure the rights of his co-tenant to partition. So one of several tenants in common cannot dedicate land to the public.

Co-tenants all have entire possession of the whole property and there is a fiduciary relation among them which imposes on them mutual rights to protection, so any act which any tenant does for the benefit of the property is presumed to be for the benefit of the whole property and no one tenant will be permitted to prejudice the rights of the other tenants. It follows from the fiduciary relation between co-tenants that one cannot buy an outstanding incumbrance against the property for his own benefit, but any purchase of that nature would inure to the benefit of all the tenants, although the purchaser may be entitled to receive contributions from the other co-tenants for their share of the purchase price.

306. **Rights to use and possession.**—Each owner has a right to use and enjoy the common property in a reasonable manner to the extent of his own interest but not to impair the interest of any other tenant. So tenants in common may make any contract they

please with each other as to the use of the property and such rights can be enforced by law. One of the tenants in common may agree with the others that he shall have exclusive use of the property and pay the others a fair rent for it, or the parties may by mutual agreement take possession of separate portions of it.[27]

307. **Liability of one tenant for rent.**—At common law one tenant in common was not liable to his co-tenants for rent for occupation of the common property even although this co-tenant occupied the whole of the common property. This is the law today except where it has been changed by statute, and in some states by a species of judicial legislation.[28] The Statute of Anne allowed an action against a co-tenant "for receiving more than comes to his just share or appropriation." This statute has been held to apply only when the rent is received from a third person,[29] and the general view is that in accordance with the ancient common law the tenant occupying the whole of the premises is not liable to his co-tenants.[30]

308. **Right of one tenant to purchase at foreclosure.**—The general American authority is to the effect that a purchase at foreclosure by one tenant in common inures to the benefit of all.[31] But in North Carolina the law seems to be different, as there was a case where after the death of the mortgagor of

[27] Davies v. Skinner, 58 Wis. 638.
[28] See, for example, Gage v. Gage, 66 N. H. 282.
[29] Badger v. Holmes, 6 Gray 118 (Mass.).
[30] Reynolds v. Wilmeth, 45 Iowa 693.
[31] Savage v. Bradley, 149 Ala. 169; Moy v. Moy, 89 Iowa 511.

land the property was purchased by one of the heirs at the foreclosure sale. And the court holds that he holds title free from any trust in favor of the other heirs.[82] There is something to be said in favor of the North Carolina rule on principle, as the basis of the doctrine that one co-tenant cannot purchase an incumbrance on a common estate for his own benefit is that the co-tenants stand in a fiduciary relation to each other and it is inequitable for one to obtain a title adverse to his fellows. In the North Carolina case, however, the co-tenancy itself has ceased through the sale under foreclosure and all have an equal opportunity to buy the property. It can be said in opposition to the North Carolina rule that it might pave the way to collusive foreclosure sales.

309. **Rights of action.**—Since there is no privity of estate tenants in common could not join in suits at common law, but had to sue separately for an aliquot part of the whole interest claimed. But this has been universally changed either by statute or by judicial legislation permitting the co-tenants to join. If a tenant in common does sue alone for a disseisin he can recover only his undivided share and be let into possession in common with the disseisor.

[82] Jackson v. Baird, 148 N. C. 29, 61 S. E. 632.

CHAPTER XXX.

JOINT TENANCY.

310. **Creation.**—Any estate may be held in joint tenancy, and wherever lands are given simply to A and B, without further words, they became at once joint tenants for life. They are regarded as one individual, as respects other persons, and the life estate would continue so long as either of them was alive. As between themselves, each would be entitled to share equally in the rents and profits while both lived, but on the death of either one the interest of the deceased joint tenant, instead of going to his heirs or representatives, passes to the survivor, who becomes entitled to the whole estate by right of survivorship during the residue of his life.[33]

An estate in fee simple may also be given to two or more persons to hold as joint tenants. In such cases the land is granted to them and their heirs, but because of the rules of survivorship, the estate will descend to the heirs of the survivor instead of to the heirs of all of them, if the joint tenancy continues so long. Thus, if an estate is given to A, B, and C, and their heirs, the three persons are seized of the entire estate. This estate as a whole will pass to the survivor or survivors on the death of either of the joint tenants, and on the death of the survivor of the three, will pass to the heirs of such

[33] Williams, Real Property (6th ed.), p. 132.

survivor, to the entire exclusion of the heirs of those who previously died.[84] A joint tenancy in fee simple is more common than joint tenancies for life or in tail. The estate is chiefly created where it is desired to have the estate vest in trustees, who are ordinarily made joint tenants, the whole estate vesting in the survivor for the uses and purposes of the trust. The joint tenants are not regarded as having any separate interests, except as between themselves, and consequently have no estate which they can devise by will, while two or more of them are living. On the death of the survivor, the estate will descend to the heirs at law, or to the devisees of such survivor.

311. **Nature.**—Joint tenancy is where owners hold in the language of the old law "per my et per tout";—in short, that each is for the purpose of tenure and survivorship the holder of the whole. But for the purposes of alienation each has only his own share, which shares are always presumed to be equal. The joint tenancy may be in any estate, whether in fee, for life, for years, at will, or in remainder. By joint tenancy is meant that two or more persons hold the title and profits of land, as respects all other persons, as though they constituted one single person. As between themselves they have distinct rights, but such rights are equal in every respect, each having the same rights as regards the estate as another. A joint tenancy is therefore said

[84] Co. Lit. 184a; Littleton, Tenures, § 280; Williams, Real Property (6th ed.), p. 134; Thornburg v. Wiggins, 135 Ind. 178, 34 N. E. 999, LEADING ILLUSTRATIVE CASES.

to be distinguished by unity of possession, unity of interest, unity of title, and unity of time of commencement of such title.[35] Joint tenancy was so favored of the common law, as the feudal system aimed to keep the title in one person, that if it was desired to create an estate by tenancy in common, it was necessary to indicate in the deed, that the estate was to be held by tenants in common and not by joint tenants.

312. **Unity of time.**—The joint tenants being regarded as but one owner, their estate or interest must be created at the same time; that is, A and B as joint tenants must receive the estate by the same grant and not come into their interest at different times.[36] A joint tenancy is created only by act of the parties and not by descent or any act of law. It must, furthermore, be created by one and the same act, deed, or devise, and joint disseisors may be joint tenants where they disseised the owner at the same time. However, under the Statute of Uses the unity of time was altered to allow two or more joint tenants to take their shares at different times.

313. **Incidents.**—Dower and curtesy cannot exist in joint tenancy on account of the nature of the estate, as such rights would be inconsistent with the right of survivorship. An entry or re-entry made by one is the entry of all unless it clearly appears to be adverse to the other tenants. So a livery of seisin made to one tenant is livery of seisin as to all. So

[35] 2 Blackstone, Commentaries, p. 180; Williams, Real Property (6th ed.), p. 132.

[36] 2 Blackstone, Commentaries, p. 181.

if one joint tenant buys in an adverse title he buys it for the interest of all if they contribute pro rata toward the expense. So no joint tenant can either sue or be sued separately. If either joint tenant commits waste, however, the other tenants can have an action against him either at common law or by statute.

314. **Examples.**—The most common remaining instance of joint tenancy in this country is that of an estate to two or more trustees where it is generally held that such an estate is held in joint tenancy and goes to the survivor, even where the right of survivorship has been abolished by law. Where deeds are made to several and their survivors the effect is not to create a joint tenancy, but to make them joint tenants for life with a contingent remainder in fee to the survivor. Furthermore, on account of the right of survivorship two corporations cannot be joint tenants, but they must be tenants in common if they hold land together.

315. **Joint mortgages.**—In some of the states in this country, as in England, the interest of the mortgagee is regarded as an estate in land. But the doctrine of survivorship is held to apply to the estate as to the debt. So that if any of the mortgagees die the survivors may proceed in their own name for foreclosure unless the debts secured belong severally to the different mortgagees named, in which case they are tenants in common and not joint tenants. When the mortgage of a joint debt is foreclosed the mortgagees become tenants in common of the estate, each taking a share of the estate propor-

tioned to his debt. Where a mortgage is given to secure debts due to two or more persons severally they take as tenants in common and not as joint tenants,[37] and the fact that two persons joined in the mortgage does not create a presumption that the estate conveyed is joint property.[38]

316. **Lapse.**—In case there is a devise by will of land to several persons together as joint tenants and one of them dies before the testator, his interest lapses and the others take the whole property, notwithstanding the statutes abolishing survivorship which apply only where the estate in joint tenancy has vested.[39] On the other hand, where the will leaves property to several as tenants in common and one dies, his share lapses and the testator is intestate as to that share in the property. So where land is granted by the state to two as joint tenants and one of them dies before the patent becomes effective the surviving grantee takes the whole. But where the grant is to two as tenants in common the survivor takes only one-half, the other half remaining in the estate.[40]

317. **Conveyance of joint estates.**—Each joint tenant is regarded in law as having the whole of the estate, so that if it was desired to transfer the interest of one joint tenant to another it could not be done by livery of seisin, as he already had possession. The proper form was to make a release by deed, which operated as an extinguishment of the rights of the

[37] Brown v. Bates, 55 Me. 520.
[38] Bowen v. May, 12 Cal. 348.
[39] Lockhart v. Vandyke, 97 Va. 356.
[40] Overton v. Lacy, 6 T. B. Mon. 13 (Ky.).

grantor.[41] Where one tenant conveys his share to a co-tenant or a stranger, the purchaser is a tenant in common with the others as to the share he bought.

318. **Severance of an estate by joint tenancy.**— The incidents of survivorship as to estates by joint tenancy might be put an end to or severed during the lifetime of the joint tenants, as each joint tenant might dispose, in his lifetime, of his share of the lands held in fee simple, by any of the usual modes of conveyance except by will. But if the tenant died without making such a sale the land went to the survivor or survivors free from his share or moiety. By a sale in the lifetime of a tenant, the share held by him was regarded as severed or cut off from the estate, and discharged from the incidents of joint tenancy, and passed to the grantee to be held as a tenancy in common. Thus, if three persons held an estate as joint tenants, and one of them sold his interest, the purchaser would become seized of a one-third part (undivided) of the estate as a tenant in common, but the remaining tenants would still be joint tenants.[42]

As early as the time of Henry VIII, by statute it was permissible for one tenant to compel his companions in joint tenancy and tenancy in common to submit to a partition of the estate between themselves according to the value of their shares, so that each might hold his portion in severalty. This method has been simplified and is enforced in the equity courts. The tenants may also make mutual

[41] Co. Lit. 169a.

[42] Co. Litt. 189a; Williams, Real Property (6th ed.), p. 136.

deeds or releases, and thus apportion the joint estate between themselves in severalty.

319. **Effect of modern statutes on an estate by joint tenancy.**—Statutes in the various states and Canada have been passed abolishing the main feature of joint tenancies, the right of survivorship, or the *jus accrescendi,* except in some cases as regards estates so granted to trustees, husband and wife, partners, and the like.[43] In Virginia and Pennsylvania the statute abolishing survivorship in joint tenancy makes an express reservation as to trust estates, since in these estates it is desired that the interest of the deceased trustee shall pass to the survivor or survivors to answer the purposes of the trust. In many of the states provision is also made by statute, that where a power is given to several trustees, and one or more die, or are discharged, the title and authority of such trustees shall pass to and vest in the survivor or survivors.

In some states the statutes abolishing survivorship and creating a presumption that the estates are in joint tenancy apply to grants or conveyances to trustees,[44] while in other cases the trustees are held to remain joint tenants. This is fair, as the joint tenancy is in the case of trust estates an advantage rather than a disadvantage.

[43] Greenleaf, Cruise on Real Property, p. 364.
[44] Sanders' Heirs v. Morrison's Ex'rs, 7 T. B. Mon. 54 (Ky.).

CHAPTER XXXI.

COPARCENARY.

320. **Definition.**—An ancient kind of estate was an estate by coparcenary, which term was applied to a form of estate which used to be prevalent in England where two or more persons form one heir to real estate. The distinction between coparcenary and joint tenancy seems to be that joint tenancy refers to persons and coparcenary refers to the estate. It can only arise by descent and the shares in it may be unequal, as where certain heirs take as representatives of another deceased heir. The seisin is joint as affecting strangers, but among themselves each is seized of his own share and on his death it goes to the heirs and does not pass by survivorship. The right of posession is in common and the possession of one is the possession of the others.

321. **Nature.**—Parceners are in a position somewhere between joint tenants and tenants in common. For example, they are joint tenants in that they have only one single freehold between them and like tenants in common there is no right of survivorship. There is the same unity of interest, title and possession as with joint tenants, but no unity of time is necessary to create the estate. Coparcenary has always been liable to curtesy and dower.

322. **Owner in coparcenary with himself.**—One peculiar feature of coparcenary is that a tenant may

be in coparcenary with himself, as, for example, if he inherits different interests in property from different branches of the family and dies intestate the various interests will then separate and pass to the families from which they came. For example, if one-half of his estate comes from his father and the other half from his mother and if he dies without children living, the property is again divided and the portion that came from the father goes to the father's heirs and the portion that came from the mother goes to the mother's heirs.

323. **Mutual rights—Conveyances.**—At common law coparceners were not liable to each other for trespass and neither were they liable for waste. But now they are liable for waste in most jurisdictions with other co-tenants. And at common law a coparcener was not held accountable if he had received an excessive share of the common profits, but under statute now coparceners are liable for this. At common law parceners could convey to each other by release like joint tenants or one could make feoffment to another like tenants in common. But this distinction is of no importance now, as in the United States all conveyances are by deed. Conveyance by a coparcener created a tenancy in common with the other coparceners and feoffment was necessary for such conveyance. Persons are parceners so long as the estate is held by them by descent and the estate is dissolved by alienation by any one of the coparceners.

324. **Present law.**—The distinction between coparcenary and tenancy in common is of practically

no importance in the United States, as the title inherited by the coparcener is in some states expressly turned into a tenancy in common and as under our state laws there is no distinction between children and the shares they have in property, since all take alike, there would seem to be no reason for any distinction today in this country. As by statute now, furthermore, heirs take almost invariably as tenants in common, the estate by coparcenary has become of small importance, although such estates may arise in some of our states.[45]

[45] Hoffar v. Dement, 5 Gill 132 (Md.). See further as to the nature of coparcenary, Littleton, §§ 241 et seq., LEADING ILLUSTRATIVE CASES.

CHAPTER XXXII.

ESTATES ARISING BY MARRIAGE IN GENERAL.

325. **Effect of marriage.**—By the act of marriage the husband and wife became at common law one person and continued so during marriage. The wife became merged in the husband, and the husband was entitled to all rents and profits from the wife's lands, and also all her personal property which passed by delivery belonged to the husband. In this country, however, legislation has everywhere altered the common law rules and now the wife's property is protected from the husband's creditors and in many states she has the right of disposal as if she were unmarried. The law of persons is abnormal in relation to the husband and wife, as it is a question of convenience only that the husband and wife are treated as one subject. Curtesy and dower are properly considered under the law of real property as they are intimately associated with real property.

326. **Estates by entirety.**—At common law the husband had full rights in an estate by entirety during the joint lives of himself and his wife, except he could not defeat the wife's right of survivorship.[46] In case an estate by entirety is severed otherwise than by death, as, for example, by divorce, the wife would then become a tenant in common with her

[46] Washburn & Campbell v. Burns, 34 N. J. Law 18; Thornburg v. Wiggins, 135 Ind. 178, 34 N. E. 999, LEADING ILLUSTRATIVE CASES.

husband.[47] However, statutes in this country have given the wife a right in her own separate property and these statutes, while they did not abolish estates by entirety, limited the husband's rights to possession during their joint lives.[48]

327. **The freehold estates of dower and curtesy.**—There are two freehold estates created for the benefit of the family. The rules of law applicable to these estates are only intelligible if one recalls that the family was originally the unit of government, and that the rules of law aimed to assist the head of this family in performing the duties which such a system of government imposed upon him. These two freehold estates, known to the early common law, and still created by operation of law, are: 1. The estate of dower, and 2. The estate of curtesy.

328. **Conveyances in fraud of marital rights.**—If a woman voluntarily conveys away her land before marriage to prevent curtesy, such conveyance is a fraud and will be set aside, while in the hands of a volunteer. But in England it is not a fraud for the husband to convey away his land to prevent dower, as it is the custom to do that and give the wife a jointure. In America, however, she could compel a volunteer grantee to give her dower. In this country a voluntary conveyance by one just before marriage unknown to the wife with the effect of depriving her of dower will be held subject to such rights as the wife may have by virtue of the marriage. On the other hand, a wife will not have dower in land

[47] Steltz v. Shreck, 128 N. Y. 263.

[48] Serviss v. Dorn, 76 N. J. Eq. 241, 76 Atl. 246.

which the husband has agreed to sell before the marriage under an oral contract when he conveys in accordance with the contract after marriage.

329. **Curtesy and dower in wild lands.**—It is held in some states that there can be curtesy in wild lands but not dower. Such a distinction is not to be defended on principle but obtains in some states. The possession in wild lands follows the title. As there cannot be possession in fact of such premises if the woman is not held to be properly seized of them, the title of the tenant by curtesy to all wild and uncultivated lands would be extinguished. The owner of such lands has always been held in possession so as to maintain trespass and there seems no reason why the same rule should not apply when the title by curtesy is in question. To require actual occupation of such lands during the coverture would be impracticable. In this country there is so much more wild land than in England that the distinction from the English rule may be made without departure from the spirit and substance of the English law.[49]

330. **Community property.**—There is in some of the southwestern states a kind of property of married persons called community property, which is a system wholly foreign to the English common law and borrowed from the civil law of Spain and Mexico. It is based on the fiction that the property belongs equally to the husband and wife and is to be managed by the husband for their common benefit. The rights of the wife under this system, how-

[49] Jackson v. Sellick, 8 Johns. 262 (N. Y.).

ever, are of a very tenuous nature and it has been consistently held that the husband has every substantial incident of ownership and can treat the property as his own. It has been said that "the community was a partnership that began only at its end."[50]

331. **Protection of rights of wife in community property.**—The whole question recently came before the United States Supreme Court, which upheld the validity of a statute depriving the husband of the right to dispose of community property without the consent of the wife.[51] The case rests upon the theory that the interest of the wife entitles her to protection and that the act was in the nature of a curative act, giving the wife a better protection for rights already existing in theory but long in dispute. It is plain that the wife has a greater interest than the mere possibility of an expectant heir, for it is conceded that in one way or another she has a remedy for alienation made in fraud of her by her husband. So the legislature has a right to provide that both husband and wife must join in conveyances of real estate acquired during coverture. Such a law is not an attempt to destroy the wife's rights, but, on the contrary, to protect them. As she was protected against fraud already, there is no reason why the legislature could not make that protection more effectual by requiring her concurrence in her husband's deed of the land.[52]

[50] Douglas v. Douglas, 22 Idaho 336, 125 Pac. 796, LEADING ILLUSTRATIVE CASES.

[51] Arnett v. Reade, 220 U. S. 311.

[52] Same.

CHAPTER XXXIII.

CURTESY.

332. **History and definition.**—The estate by curtesy, or, at common law, the estate by the curtesy of England, is the life estate which the husband has in the real estate of the wife where the wife was seized of an estate of inheritance, and bore him issue, born alive, capable of inheriting such estate. By the rules of the common law, as has been seen, the husband being the head of the family, had the right of possession and the emoluments arising from his wife's property during her life, this being an incident to the marriage relation.

In addition to this common law right, if there were issue born alive, capable of inheriting the wife's estate, the husband became entitled to a life estate in the property of the wife after her death. This right commenced at the birth of issue capable of inheriting and became complete or consummate upon the death of the wife. In case no issue were born alive, capable of inheriting, upon the death of the wife her real property went to her heirs at law, the husband having no further claims upon it.[53] But if children were born alive, though they did not continue to live, the husband had the right to retain possession of the entire property and the profits

[53] 2 Blackstone, Commentaries, p. 126; Littleton, Tenures, §§ 35, 52; Williams, Real Property (6th ed.), pp. 227, 228.

arising therefrom during his life, and was called a tenant by curtesy. The estate of curtesy arose to cut out wardship under the feudal system, which we have already considered. The tendency was to let the husband take the property from the minor children rather than to allow the lord this right. Also the possibility was considered that a man might be turned out by his own children.

333. **Curtesy in the United States.**—Unless abolished by statutes for the express purpose, or by implication from statutes known as "Married Women Acts," giving to married women the same control over their property as they had before marriage, curtesy exists in the states as at common law. Some of the states hold that the acts enlarging the rights of married women over their property are inconsistent with the estate of curtesy, and therefore abolish such estate by inference.[54] In other states curtesy has been abolished by express statutes. In Ohio, for example, the right of curtesy is abolished and the husband is given the right of dower in his wife's real property to the same extent as she has dower in his.[55]

334. **Initiate and consummate.**—The estate of curtesy exists in two stages: 1. In the initiative, upon the birth of issue capable of inheriting. 2. Consummated, upon the death of the wife.

Some of the courts have intimated that the estate by curtesy begins at marriage; this is a mistake, there is no estate at all until the birth of issue, and after issue born there exists an estate separate and

[54] Jackson v. Johnson, 5 Cow. 74 (N. Y.).
[55] Rev. Stats. Ohio 4194-1.

distinct from the right of possession of the wife's estate given by virtue of the marriage relation. The estate of curtesy ends only with the husband's death, and may be seized on execution to satisfy claims against him. If sold upon execution before the death of the wife, then it continues until the death of the husband, but if the husband dies before the wife, the estate ceases upon his death. The purchaser of such an estate acquires no greater interest than the husband had.[56]

335. **Requisites of an estate by curtesy.**—1. There must be a legal marriage to create an estate by curtesy. If the marriage is a voidable one, but never voided, it will sustain the estate by curtesy, while if the marriage is void no estate by curtesy arises.[57]

2. Issue capable of inheriting the estate must be born alive. Not only must there be an estate of inheritance, but an estate capable of being inherited by the wife's children must exist. So that if an estate is given to a woman, and to the issue of the husband she now has, and he has issue, the husband is then entitled to curtesy. But if the husband indicated dies, and the woman marries again and has children by her second husband, and then dies, the second husband is not entitled to curtesy in the lands since the issue born are not capable of inheriting the estate. There must be a freehold in the wife which her issue are capable of inheriting.[58]

It was formerly the rule that the issue must be

[56] Monroe v. Van Meter, 100 Ill. 347; Jackson v. Johnson, 5 Cow. 74 (N. Y.).

[57] Co. Lit. 38.

[58] 2 Blackstone, Commentaries, p. 127.

born during the life of the mother, and if the mother died before the child was born, or delivered, then there was no estate by the curtesy. The reason for the rule was that there was no issue during the marriage relation, since the relation was dissolved by the death of the wife. But this rule has given way to the one which holds a child in existence, though unborn, to have the same rights as though born, and so to consider it where it is for the benefit of the child. So though the child be born after the death of the mother, if it is born alive, curtesy arises.[59] In Pennsylvania, since 1833, by statute, the husband is given curtesy though there be no issue of the marriage.

If the child is born alive it does not matter how long or how short a time it lives. It is simply necessary to the vesting of the estate in the husband that the child be born alive. It has been held that if a child is born out of wedlock and the parties afterwards intermarry, and if under the laws of the place of marriage the offspring is thus made lawful, then the right of curtesy exists, and vests in the husband.[60] The general rule seems to be that the legitimation of an illegitimate child causes the father's right of curtesy to vest.[61] The policy of such a rule should be favored, as it provides a potent inducement to legitimate the child.

336. **Nature of curtesy—Transfer.**—By the intermarriage, the husband acquires a freehold estate, during the joint lives of himself and his wife, in all

[59] Co. Lit. 29b; Tudor, Leading Cases, p. 65; Marsellis v. Thathimer, 2 Paige 35 (N. Y.).

[60] Hunter v. Whitworth, 9 Ala. 965.

[61] Smoot v. Lecatt, 1 Stew. 590 (Ala.).

such freehold property of inheritance as she was seized of at the time of marriage, and a like interest vests in him in such as she may become seized of during the coverture. And the husband acquires, jointly with the wife, a seisin in fee in the wife's freehold estates of inheritance, the husband and wife being seized in fee in right of the wife. This interest may be defeated by the act of the wife alone; as if, at common law, the wife is attainted of felony, the lord by escheat could enter and eject the husband.

After the birth of issue the husband is entitled to an estate for his own life, and in his own right, as tenant by the curtesy initiate. Under the feudal law he then becomes sole tenant to the lord, and is alone entitled to do homage for the land, and to receive homage from the tenants of it, which until issue born must be done by the husband and wife. Then he may forfeit his estate for life by a felony, which until issue born, he could not do, because his wife and not he was the tenant. If the husband, after the birth of issue, make a feoffment in fee, and then the wife dies, the feoffee holds the land during the husband's life, because by the birth of issue, he was entitled to curtesy, which beneficial interest passed by the feoffment. The husband's estate after issue born would not be defeated by the attainder of the wife, for his tenancy continues, he being sole tenant. The husband, as a tenant by curtesy initiate, is seized of a freehold estate in his own right, and the interest of his wife is a mere reversionary interest, depending upon the life estate of the husband. The necessary result of this is, that the wife

cannot be prejudiced by any neglect of the husband, and of course she may bring her action, or one may be brought by her heirs, at any time within twenty years after the death of the husband, when his estate by the curtesy, whether initiate or consummate, ceases, and her right of action, or that of her heirs, accrues. In this respect there is no distinction between curtesy initiate and curtesy consummate.

337. **Seisin fundamental to curtesy.**—Seisin is one of the essential requirements of an estate by curtesy. At common law the seisin of the estate must have been by deed, seisin in law not being considered sufficient to support the estate. The reason for the rule was that it was the duty of the husband to take actual possession of the property of the wife, as she was unable to do it herself, and this duty being obligatory on the husband, if he failed to perform it, he could not have curtesy. This rule is modified by state statutes,[62] and today seisin is satisfied by a seisin in law without actual entry or receiving rent. It is enough that the wife is in possession by deed, and the husband cannot be barred by the laches of the wife in failing to take possession, as the possession was that of the wife and not his. Seisin in law is where one is entitled to possession when there is no adverse possession.[63] But the seisin of the wife, whether seisin in law or by deed, must be the seisin of a present estate. There can be no curtesy in a remainder or a reversion,[64] and nothing is better set-

[62] Wells v. Thompson, 13 Ala. 793; Guion v. Anderson, 8 Humphrey 298 (Tenn.).

[63] Ferguson v. Tweedy, 43 N. Y. 543.

[64] Malone v. McLaurin, 40 Miss. 161; Shores v. Carley, 8 Allen 425 (Mass.).

tled at common law than this. So a statute which provides that there shall be curtesy in land of which the wife is seized will not be construed to cover a seisin in remainder.[65]

338. **Incidents of an estate by curtesy.**—The estate by curtesy is a life estate, and it may be leased or assigned by the tenant in curtesy for the full term and without his wife joining in the conveyance. The purchaser of such an estate acquires all the rights which the husband would have, in case he had not sold it.[66] The estate of curtesy is also liable for the husband's debts. But the estate on coming to the husband is subject to debts of the wife.[67] A divorce obtained by the wife against the husband bars the estate of curtesy, so that a purchaser of the estate from the husband would have no claims in it though he purchased before the divorce was granted.

The most usual method of barring the estate by curtesy is for the husband to join his wife in a deed, in the same manner that a wife may bar her right of dower by joining in a deed with her husband.[68] Where a husband after the death of the wife with issue disclaimed all right in the premises it was properly held that curtesy is an estate devolving by law which can be transferred only by a formal conveyance and hence that the disclaimer was ineffective.

339. **Effect of disseisin.**—Where a disseisin has been committed upon the wife's estate the disseisin

[65] Stoddard v. Gibbs, 1 Sumn. 263 (U. S. C. C.); Bragg v. Wiseman, 55 W. Va. 330, 47 S. E. 90, LEADING ILLUSTRATIVE CASES.

[66] Shortall v. Hinckley, 31 Ill. 219; Foster v. Marshall, 22 N. H. 491.

[67] Taylor v. Smith, 54 Miss. 50.

[68] Houck v. Ritter, 76 Pa. St. 280.

is done alike to the husband and wife. A joint right of entry accrues to both for the recovery of it. If such remedy is not prosecuted within twenty years, it is barred.

This is true in those cases where the husband has acquired no estate by the curtesy, and is seized merely in the right of the wife of her estate. So if the husband is tenant by curtesy, as he and his wife are seized of the fee in right of the wife, the action must be brought by the husband and wife and a joint seisin in fee alleged in them in her right. Their joint right of action is barred by the lapse of twenty years after it accrues. But it by no means follows that the reversionary right of the wife, accruing in possession after the estate of her husband has ceased, is also barred. It is well settled that the same party may have several and successive estates in the same property, and several rights of entry by virtue of those estates, and one of those rights may be barred without the others being affected. Every reason which can exist in favor of the right of any reversioner applies in this case, namely, that a reversioner has, as such, no right of entry and no right of action during the particular estate, and consequently is not barred until twenty years after his own right of entry accrued.[69]

340. **Same subject.**—There are three classes of decisions in America. First: those in which, there being no adverse possession, the husband and wife were held to be constructively seized in deed, and such constructive seisin deemed sufficient. Second:

[69] Foster v. Marshall, 22 N. H. 491.

those in which there was an adverse possession, but a recovery in ejectment, on the death of the husband and wife, or of the husband alone, took place during coverture; and in which there was held to be curtesy, although no actual possession followed the recovery. Third: those in which an adverse possession was decided to be no bar to curtesy. It would be strange and only lead to confusion and perplexity, if where every other tenancy may be created without entry or regard to the fact of adverse possession, a tenancy by curtesy could not be so created. For even at common law a seisin in law was considered sufficient to give curtesy in all inheritances which were created without entry.[70]

341. **To what estates curtesy will attach.**—The estate by curtesy embraces all estates of inheritance held by the wife which her issue are capable of inheriting. That is, the estate attaches not only to absolute estates, but to qualified and determinable estates, the law being the same in this respect as to estates by curtesy as to dower estates. The same distinction is made between estates upon condition and estates upon conditional limitation that is made in the case of dower.[71] The estate by curtesy attaches to the estate upon conditional limitation, but does not attach to an estate upon condition. The estate by curtesy attaches to equitable estates of inheritances, though the husband is not entitled to curtesy in a mere equitable right.[72]

[70] Borland's Lessee v. Marshall, 2 Ohio St. 308.

[71] See § 359; Thornton's Ex'rs v. Krepps, 37 Pa. St. 391.

[72] Williams, Real Property (6th ed.), p. 228. As to the effect of a mortgage on curtesy, see Ketterer v. Nelson, 146 Ky. 7, 141 S. W. 409 (Ky.).

If a wife has an estate tail male and has only daughters, then there is no curtesy. So always in case of an estate tail special, it is necessary for the husband to have children which satisfy the description.

342. **The estate by curtesy cannot be barred by will of the person giving the lands to the wife.**—The right of the husband to curtesy in his wife's lands cannot be barred by the will of the grantor or testator by which the wife became possessed of the estate, since curtesy is an inseparable incident of the freehold estate which attaches by a rule of law and cannot be contravened by the wish of a private person.[73]

343. **An estate by curtesy may be barred by an intention so expressed when lands are conveyed in trust to uses.**—A trust may be so created as to exclude the husband's right of curtesy. It is important to observe what provisions in a trust instrument will be held to show an intent to bar curtesy. If the estate is given directly to the wife without the intervention of a trust, it is not a question of intent, but one of power, as the courts hold that when a fee is created the grantor has not the power to make such a limitation. But if the estate instead of being given directly is conveyed in trust to a third person for certain uses, the grantor has the power to bar the dower or curtesy if he uses language which shows an intent to do so. So in such cases the question for the court is to determine the intent of the

[73] Thornton's Ex'rs v. Krepps, 37 Pa. St. 391; Monroe v. Van Meter, 100 Ill. 347.

grantor from the language used, and if it was the intent to bar dower or curtesy it will be barred. In some of the states it is held that the estate of curtesy is not barred, unless the language used in the settlement itself bars the estate by curtesy; that is, in those states no general language will be construed to deprive the husband of the estate which the law gives him.

CHAPTER XXXIV.

DOWER.

344. **Dower defined and explained.**—Dower is the estate to which the widow is entitled and which is assigned to her out of any freehold inheritance of which her husband was seized during coverture and which her issue might possibly inherit. It is essential that the estate should be a freehold of inheritance, and that the issue born of the wife might possibly inherit the same. This estate of dower assigned to the widow, at the common law, is a life interest, in severalty, of one-third of the husband's lands, tenements and hereditaments, and did not include personal property, but did include such fixtures as were immovably attached to the freehold.

In some states the statutes have modified, and in others abolished dower. In some states the widow inherits one-third of her husband's estate. In some of the states it depends upon whether or not there are children, and if there are no children, the wife inherits the whole of the husband's estate. By the Ordinance of 1781, the common law right of dower was established in the North West Territory.

Dower is of two kinds. First, at common law; second, by church law or *ad ostium ecclesiae* (at the church door). By the first the wife was not entitled to any particular land but had to wait until it was assigned to her. The second kind of dower was

granted at the time of the marriage by the husband and it might consist of any amount of land. The Statute of Uses made provision for jointures which took the place of dower, and dower *ad ostium ecclesiae* is so obsolete that it would not be recognized today.

345. **Origin of dower.**—The origin of dower is probably to be found in a Germanic custom of the husband's giving the wife a *dos* or dowry on marriage. Among the Saxons the widow was supported wholly out of the personal estate and not until the Norman Conquest did dower in land arise. Blackstone says that the reason our law adopted it was "for the sustenance of the wife and the nurture and education of the younger children." The right has always been protected and as far back as Magna Charta the widow was free from the burden of fine and relief to which all heirs and alienees were subject.[74] The object of dower now is to prevent the husband from cutting off his wife by will.

346. **Three requisites of dower.**—There are three essentials to the estate of dower; these are: 1. Marriage. 2. Seisin of the husband. 3. Death of the husband.

1. The marriage must be a legal marriage as distinguished from a void marriage. Thus where one of the parties is insane at the time of the marriage, it is void, and the widow in such a case would have no right of dower. If the marriage is merely voidable, as for want of sufficient age, if the parties continue to live together until they have reached the

[74] Crenshaw v. Moore, 124 Tenn. 528, 137 S. W. 924.

legal age, the marriage becomes valid, and the widow would be entitled to dower.

2. If at any time during coverture the husband became seized solely in his own right of any estate of inheritance, that is, a fee simple or fee tail in lands to which any issue, which the wife might have had, might by possibility have been heir, she from that time became entitled, on his decease, to have one equal third part of the same lands allotted to her, to be enjoyed in severalty during the remainder of her life.[75] Seisin in law is sufficient, and seisin in deed is not necessary.

3. The husband's death may be a natural death, or a so-called legal or civil death, as formerly by becoming an outlaw, or entering a monastery.

347. **Nature of dower.**—The nature of the wife's inchoate interest in dower is very peculiar, as it is unlike any other interest known at common law. At the very instant she marries and her husband obtains seisin of the property, she acquires a right which nothing but her death or her own act can defeat, except possibly a taking of the property by eminent domain. No adverse possession against the husband, however long continued, can affect her right to recover dower on his death. She has a right which her husband can not interfere with, yet has not even a chose in action or personal right; and she has no right to protect her interests against waste or destruction. And her right is not an interest in real estate nor property, nor its value as such.

On the other hand, immediately on the death of

[75] Williams, Real Property (6th ed.), p. 233.

her husband, her rights, which were before inchoate, become consummate, and she may then protect her interests against waste or destruction, although she has only a chose in action or personal right and no estate in the land. She is not seized of any portion of the property until it is assigned to her, although before assignment, she may estop herself from claiming any interest by her deed and a purchaser from the husband always demands a release of dower.

When dower is assigned to her, the estate of the widow is a freehold for life, carrying with it the various incidents which attach to dower interest. She has the same interest as other life tenants and she can, for example, work old mines, but not open new ones, and may cut timber as a life tenant can.[76]

Dower is not properly succession, but on the other hand is itself an obligation of an estate created by law. It is not part of the assets to be distributed and the widow is really a creditor and in no sense a distributee; so dower is not a form of succession.

348. **Same subject.**—The importance of dower is that the wife has it notwithstanding the husband's conveyance or devise. Another characteristic is that dower can never be a right against the husband's estate but only against the land itself. So where a married man sold a portion of his land without the consent of his wife, she, after his death, petitioned to have the value of her dower in the land set apart out of his remaining estate, and the court dismissed the petition on the ground, apparently, that the wife

[76] White v. Cutler, 17 Pick. 248 (Mass.).

had suffered no damage and that the dower rights of the wife are only against the land itself.[77]

349. **Nature of dower before vesting further considered—Legislative control.**—The wife has no estate in the lands during the lifetime of her husband, and in this respect dower differs from curtesy. At common law, the husband had actual control of his wife's property during coverture. So far as dower is concerned it is an interest, and becomes an estate upon the death of the husband. During the life of the husband it is an inchoate interest, and does not become a vested estate until his death. It being a mere possibility, her deed passes no title; and she could not release her right to a stranger, but only to the owner of the fee.[78]

Until dower becomes vested, it is subject to the control of the legislature, and may be changed, modified or abolished without violating any constitutional provision. But the interest which the wife has is so far a valuable interest as to be a good consideration for a deed, though it may be destroyed by the legislature without any remuneration whatever, since it is not regarded as property within the meaning of the constitutional provision. It is not regarded as a property right but a mere inchoate interest which may ripen into an estate if the wife outlives the husband. It is an interest which the law gives her to support her family after the death of the husband. It being a provision for her maintenance after her husband's death, the law would not permit him to sell

[77] In re Park's Estate, 31 Utah 255, 87 Pac. 900.
[78] Hawley v. Bradford, 9 Paige 200 (N. Y.).

his land and deprive her of her interest. But if she had united in a deed conveying her husband's land she was estopped from claiming dower therein.[79] In some states, as Michigan, the wife may make an arrangement by which she deeds to him all her interest as to dower, so that the husband can pass a clear title by his individual deed. But this is unusual.

350. **Aliens.**—At common law the wife of an alien was not entitled to dower because an alien could not hold property. But in most if not all of the American states, an alien can hold property, and hence the widow of such a person would be entitled to dower.[80]

351. **Dower in mortgaged property.**—When lands are purchased and a purchase price mortgage is given back to the grantor, the mortgage and the deed are considered as one transaction, and the husband is regarded as taking the land as encumbered by the purchase price mortgage, and the mortgagee's lien is not subject to the widow's dower. That is, the widow is only entitled to dower in the land after the mortgage is satisfied. If the husband purchases land on borrowed money and gives a mortgage to the person furnishing the purchase price, this is regarded as two distinct transactions, and the title vests in the purchaser absolutely. So that the mortgagee's lien for the money advanced would be subject to the wife's right of dower in the whole estate.[81] These rules are not of much significance now, as in such

[79] Barbour v. Barbour, 46 Me. 9; Hill v. Haverstick, 17 Ind. 517; Hall v. Short, 81 N. C. 273.

[80] Sutliff v. Forgey, 1 Cow. 89; and 5 Cow. 713 (N. Y.); Betts v. Wise, 11 Ohio 219.

[81] Larrabee v. Rideout, 45 Me. 193; Smith v. McCarty, 119 Mass. 519; Radford v. Carwile, 13 W. Va. 572.

cases the wife is required to join in the mortgage deed to secure the purchase price, and release her dower as regards such mortgage.

352. **Dower in mortgaged property on foreclosure.**—Dower was formerly considered a mere inchoate right and an interest in land, but now it is considered as a valuable interest which will be protected. The question of the wife's rights arises in the first place when a mortgage on the land is foreclosed, and in the second place when the land is put to a public use. When there is a foreclosure the widow's right to dower in the equity of redemption is well recognized. But when the foreclosure takes place during the husband's life some courts give the wife no rights in the proceeds of the sale, because joining in the mortgage bars her from any right to the seisin or its proceeds.[82]

Other courts give the wife a right in the surplus on the ground that she has an interest in the equity of redemption and that her interest should attach to the proceeds, while still other courts take the ground that the wife mortgages her interest only as surety for her husband, and to protect her interest in the entire proceeds.[83] The last view is not commonly followed.[84]

353. **Dower in mortgaged property on transfer of equity in mortgagee.**—The satisfaction of a mortgage debt by a transfer of the husband's equity of redemption revests the wife's right of dower. The result

[82] Grube v. Lilienthal, 51 S. C. 442; Newhall v. Lynn Five Cents Savings Bank, 101 Mass, 428; Nichols v. French, 83 Ohio St. 162, 93 N. E. 897.

[83] Mandel v. McClave, 46 Ohio St. 407.

[84] Burnet v. Burnet, 46 N. J. Eq. 144.

is a just one, as the wife is to be regarded as a surety for the husband's debts, and when the debt is paid the right of dower revives. So where A gives a mortgage on land owned by him and his wife B joins in the mortgage releasing her dower and subsequently A conveys the land in satisfaction of the mortgage, the wife B has a right to recover dower in that land.[85]

354. **To what does the dower attach?—Wild lands.**—The widow is dowable in mines if they are open and being worked, but she is not entitled to open new mines, the theory being that she as a life tenant is dowable in the lands in the condition that they were at her husband's death.[86] At common law the widow had dower in all of her husband's land, no distinction being made between cultivated and woodland. In America the question has been raised in most of the states whether she was dowable in woodland, and the decisions of the question have not been uniform. In Maine, New Hampshire and Massachusetts, dower in woodland is not allowed.[87] In most of the other states dower in woodland is allowed the widow.[88]

355. **Nature and quality of the estate subject to dower.**—The estate of the husband to entitle the wife to dower must be a freehold estate that the issue of the wife might by possibility inherit.[89] The estate of

[85] Gainey v. Anderson, 87 S. C. 47, 68 S. E. 888.

[86] Stoughton v. Leigh, 1 Taun. 402 (Eng.); Coates v. Cheever, 1 Cow. 460 (N. Y.).

[87] Johnson v. Perley, 2 N. H. 56; White v. Cutler, 17 Pick. 248 (Mass.).

[88] Brown v. Richards, 17 N. J. Eq. 32; Walker v. Schuyler, 10 Wend. 480 (N. Y.).

[89] Co. Lit. 40; Swarthout v. Curtis, 5 N. Y. 301.

the husband must confer a right to an immediate freehold, that is, there must not be any intervening freehold. Thus if an estate is given to A for life, with remainder to B, here if B dies, his widow is not entitled to dower if A's life estate is still outstanding. If A dies his widow is not entitled to dower because the life estate which he had is not a freehold of inheritance. But if A dies first, B's widow would be entitled to dower, because the life interest had dropped out before B's death.

So if the husband has the life estate and afterwards acquires the remainder, and then dies, dower attaches, as the two estates merge and he becomes possessed of a freehold of inheritance.[90] Not only an intervening freehold will prevent dower from attaching, but if there is a possibility of a freehold estate intervening, the estate of the husband will not be subject to dower. Thus in the case of joint tenants, the estate of each joint tenant goes, upon the death of one of them, to the survivor or survivors; so if there are two joint tenants and one of them dies, the widow of the deceased tenant has no dower, but the surviving joint tenant taking the whole property by right of survivorship, on his death, his widow would have dower in the whole estate.[91]

356. **Seisin of husband as requisite to dower.**— The husband must be seized either in deed or in law during coverture. This was the rule of the common law, and was enforced both by courts of law and

[90] 1 Washburn, Real Property (6th ed.), p. 155; House v. Jackson, 50 N. Y. 161.

[91] 1 Washburn, Real Property (6th ed.), p. 156; Parke, Dower, p. 72.

equity. This doctrine was carried so far that if a man was seized in fact and disseized, and then married and died before he had acquired seisin again by the eviction of the disseisor, his widow was not entitled to dower. This rule of the common law has been modified by statute so that if a person is evicted by a wrongdoer, and while he is out of possession he marries and dies before again obtaining possession, the widow is still entitled to dower in the premises.

A wrongful seisin of the husband entitles his widow to dower as against all persons claiming under such tortious seisin. Where the husband only has an instantaneous seisin the wife does not hold dower, as if there is a conveyance and immediately a mortgage back. There the husband is really only a trustee, so the wife has no dower. There can be no dower as a general principle in a trustee's interest.

357. **On exchange of lands.**—In regard to dower in estates acquired by exchange, it was the rule at common law, that the widow of either party had the right to elect as to which of the lands exchanged her dower should attach, but she could not have dower in both parcels. Each widow might elect to have dower in the same parcel, but they could not have dower in both.[92] This rule of the common law has not been adopted in all of the states, the rule being in some states that both parties may be regarded as purchasers, and the widow of each would have dower in both parcels of land.[93]

To bring a case of exchange within the meaning of

[92] 1 Greenleaf, Real Property, § 12, p. 163.
[93] Cass v. Thompson, 1 N. H. 65.

these statutes and of the rule of common law, the mutual transfer must be equal. It must be a trade and not a purchase. That is, A must transfer one parcel of land to B in exchange for a parcel belonging to B. If a price is fixed on each parcel, and then the exchange is made, it is a purchase and not an exchange.

358. **Dower in equitable estates.**—Dower is held only in lands which the husband holds in fee or in tail, and not in equitable estates, at common law. There is no reason for the absence of dower in an equitable estate except that the conveyancers took that for granted and the courts did not dare to change the practice. The only exception to this is that the wife always has dower in an equity of redemption of a mortgage, if the mortgage is not in the form of a trust in a third person. By statute today, however, dower attaches to equities in most states.

359. **Dower in determinable estates.**—There is much confusion in the authorities as to dower rights in estates subject to conditions of various sorts. It would seem that no dower should be allowed beyond the life of the original estate of the husband on which the dower is based, but the old common law notion that dower attaches whenever the husband has seisin has extended the dower to many cases where it would not naturally apply. Suppose there is a bequest to A on a condition subsequent and the condition is broken and then occurs entry by the grantor. Here there is no dower right in the grantee, as the estate is destroyed. On the other hand, if one is a tenant in tail and dies without issue, then his wife has

dower as the estate runs to its natural conclusion and dower is one of the natural consequences of the estate.

If an estate is given to A and the heirs of his body, and A dies without issue, terminating the estate tail, here the widow's dower attaches the moment the estate is transferred to A. Though this right to dower is part of the estate given to A, it may outlast his death and the termination of his estate, and last until the widow's death, because it is considered as an incident to such an estate. This is true of estates of such a character granted upon conditional limitation, but not of estates upon condition. An estate upon condition is an estate granted to be held until the condition happens when the grantor has the right to re-enter. Upon such re-entry the grantor takes the estate as of the day he granted it, and free from all dower incidents.[94] So where there is a fee with an executory devise over on the death of the first taker, his wife will in most states have dower, as this is not a condition but a conditional limitation.

360. **The law will not grant dower out of a dower estate.**—It is a rule of law that a person cannot have dower out of dower. Thus, where a father is possessed of three acres of land, and he has a son who is married, if the father dies leaving a widow, she becomes entitled to a life interest in one acre of the three and the other two acres descend to the son. If the son dies before the previous dower estate terminates, his widow will be dowable only in the two acres which have descended to him, the other acre

[94] Doughty v. Doughty, 3 Halstead 241 (Tenn.).

being his in remainder on the termination of the previous life estate.[95]

361. **How to bar dower.**—At the common law the method of barring dower in lands sold by the husband was by levying a fine, in which the wife was separately examined.[96] The plan also grew up of conveying the land to uses, as to convey land to the purchaser and his heirs to the use of the purchaser and a trustee and the heirs of the purchaser.[97] In England, by the Act of 3 and 4 Will. IV,[98] becoming operative on the first of January, 1834, the statute and rules relating to dower were changed, and the husband given control over it, to the extent that dower is barred in any lands which he shall absolutely dispose of in his lifetime by deed or by will, and the widow can claim no dower as against the debts and contract obligations of her husband, so that she has no claim to dower except as against the heir at law.[99]

In America, the Statute of Uses permitting dower to be barred by a jointure, considered under § 362, has been substantially re-enacted in most of the states.[1] In Rhode Island, Virginia, Ohio, Kentucky, and Missouri, if the jointure or other estate conveyed in lieu of dower was made while the woman was an infant or after marriage, she may, after her hus-

[95] Co. Lit. 31a; Williams, Real Property (6th ed.), p. 234; Thompson v. Vance, 1 Metc. 669 (Ky.); Bondurant v. Buford, 1 Ala. 359.

[96] Williams, Real Property (6th ed.), p. 233.

[97] Williams, Real Property (6th ed.), p. 234; Thompson v. Vance, 1 Metc. 669 (Ky.).

[98] c. 105.

[99] Williams, Real Property (6th ed.), pp. 236, 237.

[1] Kennedy v. Nedrow, 1 Dallas 415 (Pa.); Hastings v. Dickinson, 7 Mass. 153.

band's death, waive it and claim her dower. In Maine, Massachusetts, Indiana, and Arkansas, no jointure will bar the dower, unless made before the marriage and with the consent of the wife expressed in the deed, and such are substantially the provisions in Connecticut and Delaware, and, it is believed, in most of the states.[2]

The usual method of barring dower in lands which the husband desires to sell, is for the wife to join in the deed, and therein release and relinquish her right to dower. In some states it is necessary to examine the wife apart from her husband in taking the acknowledgment of such a deed, but in other states this is not necessary.[3]

362. **Loss of dower by dedication.**—If a husband dedicates his land to the public and it is accepted the dower is destroyed on the theory that public rights are preferred to private rights. In the same way when a husband grants land to a railroad for public use the dower is extinguished; and so when land is taken by eminent domain. The wife's interest, however, is paid to her in such cases out of the proceeds of the dedication or taking.

363. **Loss of dower by adultery or divorce.**—If the wife is adulterous, or if she goes away from her husband, then she loses dower, even without divorce, under the old English statute, and this statute is still in force here in a few states. But usually in this country our divorce statutes have created a

[2] 1 Greenleaf, Cruise on Real Property, pp. 195, 200; Rev. Stats. Ohio, § 4189.

[3] House v. Jackson, 50 N. Y. 161, LEADING ILLUSTRATIVE CASES; In re Rausch, 35 Minn. 291, LEADING ILLUSTRATIVE CASES.

new rule and divorce is necessary to bar dower.[4] But if the divorce is owing to the fault of the husband the wife generally will retain her dower. If the husband brings a libel for divorce and dies pending the libel, then the wife will hold dower except for statutory provisions otherwise.

364. **Jointure to bar dower.**—One method of barring the wife's dower is by settling upon her an allowance previous to marriage, which is accepted by her in lieu of dower. This is called a jointure and was, at one time, universal in England, although it is now almost entirely obsolete. Jointures are created by marriage settlements, transferring property to trustees for the wife. They are of two kinds, at law and in equity. Jointures at law are created where estates in lands are made to a woman in contemplation of marriage, or to a wife after marriage in satisfaction of dower.

By the Statute of Uses, it was expressly provided that if land was conveyed for the benefit of a wife before marriage, as her jointure, her dower was barred unless she was evicted from her jointure lands; and if the jointure was created after marriage she might elect to take either the jointure or dower. The jointure in order to operate as a bar to dower must have the following requisites: First, it must take effect immediately on the death of the husband. Second, it must be for her own life and so no estate for years or pur autre vie would be sufficient, although, of course, it would be good if made to her in fee. Third, it must be made to her direct and not in

[4] Van Cleaf v. Burns, 118 N. Y. 549, 23 N. E. 881.

trust for her. Fourth, it must be expressed in the deed as in full satisfaction of her dower. This statute is law in this country.

Under this act in England the parties could not avoid common law dower by direct act, but all the land was settled and so settled that there was no dower, as it was placed in the hands of trustees under various jointures and settled on the husband for his life only. If he was given the fee these old jointures would give him power to re-settle it. So dower ceased to exist through these costly settlements and other provisions to bar dower. Dower has been recently repealed by statute in England.

365. **Gift by will in lieu of dower.**—Dower may be barred by a provision in the husband's will expressly said to be in lieu of dower, and if the wife elects to take under the will, she is thereby cut off from dower rights. The election may be proved by overt acts on the part of the wife, as by accepting the property, or the election may be expressed in writing. Conveyancers would do well to obtain such an express writing from the wife in any such case, as otherwise it would always be a question for the jury as to whether the wife had really elected to take under the will or not.

Where the will of the husband contains a provision for the wife's benefit, the doctrine of election arises; that is, the wife in some cases is required to elect whether she will claim her dower in opposition to the will, or accept its provisions in place of it. Thus in Delaware any devise, and in Pennsylvania any bequest or devise, will be taken to be in lieu of

dower, unless the testator declares otherwise, the widow still having her election. In New York, New Jersey and Tennessee, any testamentary provision defeats the dower unless within a certain time the widow dissents, as also in Massachusetts, Ohio and Alabama, unless it plainly appear by the will that the testator intended she should have both.[5]

366. **Dower barred by adverse possession.**—So where the ancestor was a married woman her right accrued, but her marriage and the birth of children had vested a life estate in the husband. Disseisin was done to him, and no right of action accrued to her in virtue of her reversionary interest, until she became a widow, and the estate of the husband had terminated; and, therefore, an action brought by her within twenty years after his death is not barred by the Statute of Limitations.[6]

367. **Assignment of dower in general.**—The widow is entitled to her dower set out to her immediately upon the death of her husband; but until it is assigned, she has no right to any specific land. No writing or livery of seisin was necessary to complete the assignment, but it might be done by parol.[7]

368. **Two methods of assignment.**—There are two methods of assigning dower, one "of common right" and one "against common right." The first is by legal process and the second is by agreement on the part of the wife.

When dower is assigned in the first method it

[5] Williams, Real Property (6th ed.), p. 236 note.
[6] Foster v. Marshall, 22 N. H. 491.
[7] Harrington v. Harrington, 142 N. C. 517, 55 S. E. 409.

must always be done by metes and bounds, but where the parties agree on the assignment of dower, some other form may be effectual. The widow is bound by any dower assigned by agreement, whether it is more or less valuable than the legal dower would have been; and she cannot insist upon a new assignment though her title to what she has accepted is found to be invalid.

Dower of common right must be assigned absolutely and not accompanied by any condition and must be absolute for her life, as any less estate would not bar her suit to recover her dower whatever might be its value. When dower is set out by agreement it must be done by the tenant of the freehold, who may set it out even though his title is not valid.

369. **Proceedings to enforce assignment.**—Where the widow cannot obtain her dower by agreement she may bring a common law action for dower or she may bring proceedings in equity or it may be assigned by statute in some states through the probate court. Usually a demand must be made before commencing an action for dower, and the heir or the tenant will have a certain period after demand in which he may assign the dower. A demand may commonly be made by an attorney, but it must be made personally on the tenant in most states. The demand need not be in writing, but may be by parol. Where it is made by attorney the power of attorney need not be in writing.

An action for dower in this country must be brought where the land lies and like all real actions lies only against the tenant of the freehold at the

time the action was commenced. Suit may be against the tenant of the freehold. The suit is personal in nature and if the widow dies during the pendency of the action it will abate. Where the widow prevails she may commonly obtain judgment for her dower and damages for the delay in giving her the property, together with her costs. Damages could not originally be made a part of the recovery in an action for dower, but have been added by an early English statute. The rule for computing damages seems to be one-third of the value of the annual rent and profits of the estate out of which dower is claimed, during the length of time of the detention.

370. **Time of estimating value—Improvements.**—The question of the time in reference to which the value of dower or its income shall be estimated has led to different rules in various jurisdictions. Where claim is made of the heir, there seems to be no question that the value and condition of the estate as it is when the dower is actually assigned is the proper test unless the heir has done affirmative acts to injure the estate since the death of the husband. If the heir has improved the property, he has done that at his own risk and can claim no recompense for it in case the improved property is set off to the widow.[8] And so with crops—after the death of the husband the heir cannot claim the crops as emblements belonging to him if he sowed them before the assignment of dower. If, without the fault of the heir, the estate is decreased in value between the

[8] Dunbar v. Dunbar, 254 Ill. 281, 98 N. E. 563, LEADING ILLUSTRATIVE CASES.

death of the husband and the assignment of dower, the widow must bear this loss pro rata. If the heir has wrongfully injured the inheritance, it can only be set out to the widow in its condition at the time of assignment, and the widow must bring her action for damages for such wrongful act.

371. **Same subject.**—In England the widow has a right to share in all advances in value in the hands of the grantee or heir up to the moment when her interest in the property is set off. This is an ancient rule which had an exception to the effect that where land was sold by the husband permanent improvements subsequently made were not to enhance the share of the wife. But this exception is apparently now discountenanced in England.[9] The distinction, however, was recognized in this country before it was repudiated in England and it is still law today. In this country the wife may always share in the increase in value of the property from natural causes before it is set off to her and so from artificial causes. But it is the general rule that increase in price through the efforts of a grantee from the husband will not benefit the wife's dower.[10]

In case wild lands have been sold by the husband, and have been subsequently improved by the grantee, the widow is entitled, under the Ohio rule, to dower in them as of their value at the time of the assignment of dower, less the value of the improvements.[11] Under the New York rule, also the common

[9] Williams v. Thomas, 1909, 1 Ch. 713 (Eng.).
[10] McClanahan v. Porter, 10 Mo. 746.
[11] Allen v. McCoy, 8 Ohio 418.

law rule, the widow is entitled to dower in the lands of her husband which he had sold and which had been subsequenty improved, as of their estimated value at the time of the sale, without any reference to the improvements or enhancement in the value of the lands.[12] In Pennsylvania, the wife is not entitled to any advantage by reason of improvements added to the land by the purchaser, but she is entitled to the improvements in the general surroundings of the land and country, by which the general value of all land is increased, and this rule is followed in other states.[13]

The general rule in this country is that the widow is entitled to dower according to the value of the land at the time dower is assigned, excluding, however, the value of all improvements made upon the property by the grantee after the conveyance by the husband, thus leaving the widow with the full benefit of any increase in value arising from circumstances unconnected with these improvements.

[12] Humphrey v. Phinney, 2 Johns. 484 (N. Y.); Walker v. Schuyler, 10 Wend. 480 (N. Y.); Tod v. Baylor, 4 Leigh 498 (Va.).

[13] Thompson v. Morrow, 5 Serg. & R. 289 (Pa.); Dunseth v. Bank of United States, 6 Ohio 76.

CHAPTER XXXV.

HOMESTEAD EXEMPTIONS.

372. **Origin of homestead.**—At common law the real estate of a debtor could not be subjected by legal process to the creditor, but now by statute everywhere this rule has been changed. The result of giving creditors a clear right of action against land was unfortunate in that it subjected debtors to the possibility of losing their homes, and to protect families, statutes have been universally passed in this country protecting what is known as the homestead, which includes land and a house up to a certain minimum value where the family lives and the head of the family resides. The homestead statutes give no new title and in fact have no effect on the title, and they create no new interests but simply bar the creditors from attaching the property. In some jurisdictions the right of homestead has been called a mere privilege or right of exemption and not an estate,[14] while in other states under other statutes the homestead has been called an estate in land of various kinds.[15]

373. **Validity of homestead laws.**—The legislature has a general power without question to exempt the homestead of a debtor from attachment provided there is nothing in the constitution affecting this

[14] Citizens' National Bank v. Green, 78 N. C. 247, 253.
[15] Mueller v. Conrad, 178 Ill. 276.

right, and so it is within the legislative power to grant homestead rights to the wife or children of a deceased owner of land. It is, of course, within the power of a people in passing a new constitution to provide for homestead laws. These laws will, of course, be subject to constitutional provisions against class legislation and governing their titles. The only limitation is that no homestead law can be passed to operate retroactively on claims of creditors already in existence.[16]

374. **Validity and effect of repeal.**—Where the homestead exemption is a mere privilege and not an estate, it is clearly within the power of the state legislature to repeal any such exemption laws, not only as to future debts, but also as to existing property and debts, as the exemption is not regarded as a vested right.[17] On the other hand, where the homestead exemption is regarded as an estate, or a vested right, the debtor cannot be deprived of it by any repeal as to debts then in existence.[18]

375. **Beneficiaries.**—The object of most of the homestead statutes is to protect families rather than debtors themselves, although in some states the right is given to everyone, whether he has or has not a family.[19] The statutes usually allow homestead exemptions only for a householder or a housekeeper, or a person having others dependent upon him for support.

[16] Edwards v. Kearzey, 96 U. S. 595.

[17] Harris v. Glenn, 56 Ga. 94.

[18] Clark v. Snodgrass, 66 Ala. 233.

[19] Myers v. Ford, 22 Wis. 139; Bell v. Carter, 138 Ga. 530, 75 S. E. 638,

376. **Head of a family.**—The common form of homestead statutes is an exemption to a head of a family or to a family, and the courts have held this to mean that there must be more than one person in a family, which persons are living together under such conditions that the head of the family is under a legal or moral obligation to support the others, and the others are dependent upon him for support. One person cannot be the head of a family, while two persons, as in the case of a husband and wife, or a father or a mother and child, may be sufficient. But persons living together in adultery do not constitute a family within the meaning of the homestead laws.[20] It is necessary that the persons live together in one house, and various relatives living apart though all supported by and dependent upon one person are insufficient to constitute him the head of a family.[21]

377. **Obligation to support requisite of head of a family.**—There must be, according to the weight of authority, some obligation to support others in order to constitute one the head of a family. So a homestead cannot be claimed by a widow having a daughter and grandchildren living with her unless they are dependent upon her.[22] The same is true of a man living with a brother who is not able to support himself, or a widower having married daughters who board with him together with their husbands.[23] In some states a mere natural or moral obligation to support is held insufficient to constitute one head of a

[20] Lane v. Phillips, 69 Tex. 240.
[21] Linton v. Crosby, 56 Iowa 386.
[22] Ramey v. Allison, 64 Tex. 697.
[23] Louisville Banking Co. v. Anderson, 106 Ky. 744, 44 S. W. 636.

family but there must be a legal obligation. But in most states the moral or natural obligation is held sufficient.[24] Under this rule a claim to a homestead may be allowed to a widow with no children who took care of the children of a deceased sister of her deceased husband; or to a widow taking care of her step-children; or to a woman taking care of a grandchild or grandchildren; or to an unmarried man; or a widower taking care of a father, or mother, or brothers, or sisters, who are actually dependent upon him for their support.[25] The persons in the family must be legitimately members of the family and must belong there in good faith and not simply brought there for the purpose of claiming a homestead. So a man may be still the head of a family and entitled to homestead although he does not perform his obligation to support.

378. **Relationship constituting family.**—A formal legal adoption will create the adopting parent the head of the family. Also an illegitimate child may make the parent the head of the family. The relationship, to constitute a family, must be in some way through consanguinity and it is clear that a mere contract relation is insufficient to constitute the parties a family, although the persons may live together under one head. So a person living alone with servants is not a head of a family,[26] nor is a boarding house keeper a head of a family.[27] A husband is the head of the family, even though he quarrels with his

[24] Ellis v. White, 47 Cal. 73; Bank of Versailles v. Guthrey, 127 Mo. 189.
[25] Parsons v. Livingston, 11 Iowa 104.
[26] Ellis v. Davis, 90 Ky. 183.
[27] Roco v. Green, 50 Tex. 483.

wife and does not cohabit with her,[28] and although he leaves home for different periods. So a widower with children or other relatives dependent upon him may be the head of a family; and also a widow with children dependent upon her may occupy that position. An unmarried man or an unmarried woman may be the head of a family if he or she maintains a home and supports persons who live with and are dependent upon him or her.

379. **When status must exist.**—The status necessary to claim a homestead need not have been acquired at the time the debt was created, but it is sufficient if it is acquired before the levy on the property or other imposition of a lien.[29] In most states it is held that after a homestead has once arisen it is not lost by the alteration of conditions of the persons claiming it, as by the loss of the family, or the head of the family. But in other states it is held that when the head of the family loses his condition he also loses his homestead rights. It seems to be pretty clear that temporary loss of the status as head of a family does not affect the homestead.[30]

380. **Wife as head of a family.**—Under the statutes granting a homestead to the head of a family it seems clear that the wife can never acquire such rights, even in her own property, as the husband is in law always head of the family.[31] On the other hand, there are many decisions that a wife may be-

[28] Barry v. Western Assurance Co., 19 Mont. 571.
[29] Richardson v. Adler, Goldman & Co., 46 Ark. 43.
[30] Hebert v. Mayer and Sheriff, 48 La. An. 938.
[31] Producers' National Bank v. Cumberland Lumber Co., 100 Tenn. 389.

come head of a family where her husband is disabled or otherwise unable to support the family and she does support it, or where the wife is deserted by the husband[32] and the family remains dependent upon her, or even where the wife and the husband separate by agreement. The wife cannot in general claim a homestead in her husband's property. A wife who claims to be the head of a family can only act as such while she continues to occupy the premises, although she may still hold her rights where she has been forcibly ejected from the premises.[33] In some states, however, it is held that the wife can claim the right of homestead for the family if the husband fails to do so.[34]

381. **Children.**—Unless expressly provided for, children have no rights in the homestead property, as the parents have the whole title,[35] although some states protect children in homestead rights.[36]

382. **Effect of divorce.**—In most states where a homestead has once been acquired, it will not be lost because the husband obtains a divorce, and also the same result is reached where the wife obtains a divorce for the fault of the husband.[37] The custody of the children on divorce has no effect on this question.[38] On the other hand, in some states, the husband may have a right of homestead in his wife's property. And where this is obtained, a divorce will

[32] Kenley v. Hudelson, 99 Ill. 493.
[33] Mix v. King, 66 Ill. 145.
[34] Hemphill v. Haas, 88 Ky. 492; Comstock v. Comstock, 27 Mich. 97.
[35] Shepard v. Brewer, 65 Ill. 383.
[36] Wiggin v. Buzzell, 58 N. H. 329.
[37] Biffle v. Pullman, 114 Mo. 50.
[38] Redfern v. Redfern, 38 Ill. 509.

terminate the homestead, even although he continues to occupy the premises.[39] A divorced wife is in the same situation as an unmarried woman and may claim a homestead in her own property in some states if she is the head of a family, and supporting children or other relatives. She can, however, have no rights of homestead in the husband's property, unless it is granted her by the divorce proceedings.

383. **Residents.**—The right of homestead is frequently confined to citizens. In some states, however, it is sufficient that the debtor is a resident of the state, even though he is actually legally domiciled in another state.[40] Some courts have held that homestead, from the nature of the right, should be limited to residents in the state, even although there was no such express provision in the statute, as the public policy of the state only extends to protect resident debtors, or citizens of the state.[41] Other states expressly confine homestead rights to residents, and this means those actually residing within the state. For example, if a man owns a house and land in the state and lives elsewhere permanently he cannot be said to be a resident of the state within the terms of the statute.[42]

Actual removal from the state will, of course, terminate the homestead rights, but mere intention to remove does not do so.[43] A temporary removal from the state is not sufficient to terminate the homestead.

[39] Burkett v. Burkett, 78 Cal. 310.

[40] Fulton v. Roberts, 113 N. C. 421; contra, Lindsay v. Murphy, 76 Va. 428.

[41] Lindsay v. Murphy, 76 Va. 428.

[42] Lee v. Moseley, 101 N. C. 311.

[43] Davis v. Land, 88 Mo. 436.

So it was held that a man did not lose his residence nor his homestead rights by fleeing from the state for the purpose of escaping a criminal prosecution, when his family remained on the homestead and he intended to return when the prosecution was dismissed.[44] The debtor need not have been a resident of the state at the time the debt was contracted. But it is enough if he is such when the lien or levy accrues on the land.[45]

384. **Estate to support homestead.**—A homestead right may commonly be claimed in any kind of an estate, whether in fee, or for life, or any other interest liable to seizure for debts, provided the interest is a present right of occupancy. For example, there can be no homestead in a remainder or a reversion, although there are situations where the remainderman may claim a homestead after the close of the particular estate, if the creditors have failed to complete their levy by sale.[46] A homestead may be claimed in a life estate as the life tenant is the owner within the meaning of the law, and the homestead estate terminates with his life estate.[47] It follows from this that the homestead may be claimed by a tenant by curtesy, and also by a widow having a dower interest.[48] The homestead is, of course, subject to the rights of strangers having a paramount title.[49] One who occupies without right after having conveyed title, cannot claim a homestead; and neither

[44] Chitty v. Chitty, 118 N. C. 647.
[45] Finnegan v. Prindeville, 83 Mo. 517.
[46] Stern v. Lee, 115 N. C. 426.
[47] Kitterlin v. Milwaukee Mech. Insurance Co., 134 Ill. 647.
[48] Potts v. Davenport, 79 Ill. 455.
[49] Brooks v. Hyde, 37 Cal. 366.

can one who occupies land under a deed which really passes no title.[50] There are courts, however, which hold that title is unnecessary to support the homestead, and that all the debtor needs to prove is actual possession as against creditors.[51]

385. **Leasehold interest.**—By statute in some states, and in other states without any express provision of the statute, it is generally held that a leasehold interest is sufficient to support a claim for homestead if the property is occupied as a homestead by the lessee. This homestead right, of course, does not survive the term of the lease and can have no effect on the right of the lessor to terminate the lease and recover possession. Where, however, the lessor also occupies the land under a provision in the lease, the lessee cannot have any homestead in it, as there cannot be two homesteads in the same land.[52]

386. **Purchaser.**—An occupant of land under a contract to purchase it may claim a homestead, even although he has not yet received his deed. This doctrine applies to oral contracts within the Statute of Frauds where possession is actually held by the debtor. This exemption right is subject, of course, to the vendor's claim for the purchase price or his other rights under the contract to re-enter for breach of performance.[53] Public lands occupied under state or federal law as a homestead under a contract to purchase from the state may be also exempt although the fee still remains in the state.[54]

[50] Berry v. Dobson, 68 Miss. 483.
[51] Whitehead v. Mundy, 91 Ga. 198.
[52] Hay v. Whitney, 59 Kan. 771.
[53] Stafford v. Woods, 144 Ill. 203.
[54] McCabe v. Mazzuchelli, 13 Wis. 478.

387. **Equitable interests.**—An equitable interest is sufficient foundation for a homestead even where equitable interests are not expressly included in the statute, when the statute covers land owned and occupied by the debtor.[55] The equity of redemption held by a mortgagor is sufficient basis for a homestead exemption, as this is an equitable estate.[56] Where land is taken in the name of one person for another, no homestead can be claimed by the person who has paid the money, as he has no legal or equitable interest in the property, in some states where the law is that such a situation creates no trust. This is especially clear where the transaction is really in fraud of creditors.[57] But where the payment of money for land creates an equitable interest in favor of the person who pays the money, although title is taken in another, it is held that he has such an equitable interest as will support a homestead. For example, where the husband buys land and occupies it as his home and has the title put in the name of his wife, the husband has an equitable interest sufficient to found a claim of homestead,[58] especially where he has an agreement with his wife to convey the property as he may direct.[59] A person, however, who has only a naked title to land in trust for another with no beneficial interest has no right of homestead.[60]

388. **Co-tenancies — Partnership property.**—In

[55] Stafford v. Woods, 144 Ill. 203.
[56] Fellows v. Dow, 58 N. H. 21.
[57] Johnston v. McPherran, 81 Iowa 230.
[58] Edmonson v. Meacham, 50 Miss. 34.
[59] Reeves v. Peterman, 109 Ala. 366.
[60] Rice v. Rice, 108 Ill. 199.

some courts it has been held that a homestead exemption cannot be claimed in land held in common,[61] even though one of the co-tenants is in exclusive possession of the property;[62] or where he owns almost the entire interest; or where land is owned in common by a family living upon it.[63] In most states, however, the co-tenants have been allowed a homestead exemption where the land is occupied by one co-tenant as a home and this right has been accorded to a coparcener or other tenant, provided he is in occupation, even though not in exclusive possession. For example, if land is owned by two joint owners and both of them live on the property, each in a separate building and no partition has been made of their interests between them, they are each entitled to a homestead.[64] Any such interest, of course, is subject to the underlying claims of the co-tenants.

The general rule allowing co-tenants to claim homestead probably does not apply in its full extent to partnership property, on the ground that a partner has no interest which he can transfer without the consent of his co-partner and as the partners have the right to demand that the partnership assets shall be applied to the payment of partnership debts.[65] It is held in some states that even the consent of partners is insufficient to allow the creation of a homestead, but the prevailing doctrine is that homestead can be claimed with the consent of the partners.

[61] Rosenthal v. Merced Bank, 110 Cal. 198.
[62] Holmes v. Winchester, 138 Mass. 542.
[63] Seaton v. Son, 32 Cal. 481; Giblin v. Jordan, 6 Cal. 416.
[64] Meguiar, Helm & Co. v. Burr, 81 Ky. 32.
[65] Pond v. Kimball, 101 Mass. 105.

389. **Occupancy.**—Homestead means the place where a man has his home and lives with his family and homestead exemption may be claimed in either city or country property. There can be no homestead unless the premises are actually occupied and used by the claimant as a home, and this occupancy is necessary commonly even though not expressly required by statute. Occupancy must be actual and the purchase or improvement of land with the intention of occupying it as a homestead is commonly insufficient, even though this intention is carried out later.[66] In some other states, however, the requirement of occupancy may be satisfied by fitting up premises for a home, which may be followed by actual occupancy within a reasonable time, where the delay is only for the purpose of effecting the necessary improvements or repairs. Where this is the law intention to occupy must be followed by actual occupancy. This purpose must be one to occupy at once and not at some indefinite time in the future and must be manifested by some overt act.[67] This intention must be conceived before the creditors levy on the property and must not arise after that for the purpose of avoiding the creditors' rights. The mere fact that the debtor is forced by lack of means to discontinue for a time the building, may not be enough to take away his rights.[68]

390. **Land used in part as residence.**—Premises may be claimed as a homestead only where they are used as a residence, but the fact that they are used

[66] Currier v. Woodward, 62 N. H. 63.
[67] Lake v. Nolan, 81 Mich. 112.
[68] Dobkins v. Kuykendall, 81 Tex. 180.

in part for other purposes will not prevent the whole estate from being claimed as a homestead.[69] Therefore a debtor residing on premises which he also uses for a hotel or lodging house may be able to claim that as a homestead.[70] But it has often been held that where the place is used principally and chiefly as a place of business, it cannot be claimed as a homestead even though it is incidentally used as a place of residence.[71] In a California case, for example, it appeared that part of the land was used as a blacksmith shop and for wagon making and that only a portion was used as a residence, and it was held that only the part used as a residence could be claimed as a homestead.[72]

391. **Land attached to residence.**—The homestead is not confined to the land on which the dwelling house is situated, but may include other lots used for homestead purposes. So land used for household purposes such as furnishing water, or drying the clothes, or for a stable, or as a right of way to the street, is properly included as homestead. In some states even land detached from the family residence may be included as homestead,[73] while other courts have held that a detached piece of land, though used for family household purposes, cannot be included in the claim of homestead. These decisions, however, seem to depend largely on the language of the particular statutes construed. There seems no reason

[69] Groneweg v. Beck, 93 Iowa 717.
[70] Lamont v. Le Fevre, 96 Mich. 175.
[71] Bell v. Anniston Hardware Co., 114 Ala. 341.
[72] In re Allen, 78 Cal. 293.
[73] Buxton v. Dearborn, 46 N. H. 43.

why, in the absence of particular language requiring the homestead to include only property adjoining the residence, detached parcels of land should not be exempt as homestead if they are within the statutory limitation as to value and the use made of them. Where one piece of land corners on another, for example, the decisions are in conflict as to whether this is a part of the homestead.[74] It is commonly provided that more land may be claimed as a homestead in the country than in the city, but where the term "lot" is used there is some uncertainty as to whether this means a lot according to the survey or whether it simply means one contiguous piece of land.[75]

392. **Proceeds of sale.**—There is a doctrine that the proceeds of the sale of an exempt homestead are also exempt, and so the right may follow the rent or mining royalties, or crops raised on the homestead, or property purchased with the income from the homestead. It seems clear, however, that in the absence of such statute the debtor is properly held to waive or abandon his right of exemption if he sells his property and that the exemption will not follow the proceeds of the sale. However, if the sale of the reversion is involuntary as under a judgment, or in condemnation proceedings, or by execution sale for a debt which is not preferred, the right of exemption follows the proceeds.

393. **Claims excepted.**—The homestead exemptions commonly bar liabilities of all kinds, even those

[74] Kresin v. Mau, 15 Minn. 116.
[75] Ward v. Huhn, 16 Minn. 142.

arising in tort. Exception is, however, usually made of the claim of the former owner for the purchase money or for money borrowed to pay the purchase price; or where a trustee has used trust funds to buy the property; or where the debt is for labor or materials furnished in the improvement of the premises; or for money borrowed for paying for labor and materials. In addition, taxes are commonly excepted.

394. **Loss by waiver, sale or otherwise.**—Homestead may be waived by selling or mortgaging the property or there may be an implied waiver by failure to assert the right by surrender of possession, or by failure to assert homestead against the creditor. So the right may be lost by forfeiture on account of the fraud of the debtor. It is held commonly that the death of the wife or the coming to majority of the children will not destroy the homestead rights where the other requisites are still complied with. It seems well settled that the owner of the homestead has a right to sell it or even to give it away, or to place any incumbrance upon it that he sees fit. The husband alone has the power to destroy the homestead right by leaving the premises. Where, however, the husband deserts the wife and she continues to live on the homestead premises she may retain the statutory exemption so long as she continues to occupy the premises.

Homestead is commonly lost by removal from the premises except in a case of temporary removal intending to return. There have been various decisions as to how long a removal can be called tem-

porary and what the intention of the debtor must be and how it must be proved. These matters are almost all, however, questions of fact on which only the general principles can be indicated in this article. Of course, a debtor may change his homestead, but when he takes his new homestead he takes it subject to all liens which have already accrued upon it.[76]

[76] Freiberg v. Walzem, 85 Tex. 264.

PART II

USE AND ENJOYMENT INCIDENT TO OWNERSHIP OF LAND

CHAPTER XXXVI.

RIGHTS APPURTENANT TO LAND.

395. **Appendant and appurtenant distinguished.**—At the early common law the distinction between rights that were appendant to land and rights that were appurtenant to it was clearly made. The word "appendant" signified something that went with the land as necessary for its enjoyment. Thus, under the feudal system, when lands were given to the villeins by the lord of the manor, there were certain interests and rights which went with the land as necessary to its beneficial enjoyment, as rights of pasture, of estover, of fishery, of common, and the like, which were always appendant to the estate unless they were acquired afterwards by the tenant. The tenant might also acquire other special privileges afterwards, so that the parcel of ground would not only have the appendant privileges necessary to its enjoyment, but might have other privileges acquired after the original grant, and called appurtenant since they were acquired afterwards, and were not essential to the enjoyment of the estate.[77] But

[77] Co. Lit. 121b, 122a.

this distinction is of little significance in this country at the present time.

396. **The word "appurtenant."**—Strictly speaking the word "appurtenant" is not an apt word to describe a right not previously existing, as it has come to mean and describe rights which have always existed, or have belonged to the land, and not a newly created interest. It has been construed by the courts to mean, where necessary to carry out the true intention of the parties, "as usually occupied," or "as then occupied or used." So if a person owns two parcels of ground, and is using one parcel in connection with the other, as by draining across it, or other use, and he sells one parcel and the purchaser desires to use it just as the seller has used it, the grant should specify that it is to be used and occupied as it has been used and occupied previously, which would give the purchaser the right so to use it. But the same effect will be given to the sale if the deed conveys one parcel and its appurtenances, provided the surrounding circumstances show that the word "appurtenant" was used with the intention that the purchaser should acquire the privileges of the former owner in the other parcel of land.[78]

The use of the word "appurtenances" in a grant of land will not be construed to convey anything but legal rights, so that if the grantor had been using adjoining land unlawfully, his deed would not give the grantee a right to continue such use; and a warranty of title would not extend to such unlawful

[78] Thomas v. Owen, 20 Q. B. D. 225 (Eng.); Mo. Pac. Ry. Co. v. Maffit, 94 Mo. 56; Hoskins v. Brawn, 76 Me. 68.

use.[79] So land cannot pass as appurtenant to land, but must be included in the description in the deed.[80] But sometimes in the construction of a will it is necessary to allow a parcel of land to pass under the will, not perhaps as appurtenant to land, but because the construction of the will demands it.[81] An easement must belong to the estate, unless specially described in the conveyance, in order to pass under the grant as appurtenant.[82]

397. **The nature of things that may be appendant or appurtenant to land.**—It is said that nothing can be properly appendant or appurtenant to anything unless the principal or superior thing is of perpetual existence or continuance. Again, the appurtenance and thing to which it is appurtenant must be of the same nature. Thus, a lime-kiln on adjoining premises will not pass as appurtenant to a mill for grinding grain, though used in connection with such mill. And stock in an elevator or grain storehouse will not pass as appurtenant to a mortgage deed of railroad property. Furthermore, if a person has a right or privilege which he is to exercise separate from the land, it is not appendant or appurtenant to the land.[83] And no right can pass with land as appurtenant to it unless it is a legal right. Also the appurtenance must be something which adds value to the thing to which it is appurtenant.[84]

[79] Loomis v. Barrett, 4 Vt. 450; Meek v. Breckenridge, 29 Ohio St. 642.

[80] Blanchard v. Page, 8 Allen 281 (Mass.); Miller v. Mann, 55 Vt. 475.

[81] Blackborn v. Edgley, 1 P. Wms. 604 (Eng.).

[82] Parker v. Bennett, 11 Allen 388 (Mass.).

[83] New-Ipswich W. L. Factory v. Batchelder, 3 N. H. 190; Nicholas v. Chamberlain, Cro. Jac. 121 (Eng.).

[84] Humphreys v. McKissock, 140 U. S. 304; State ex rel. v. Ross, 118 Mo. 23.

398. **Transfer of rights appurtenant.**—A right appurtenant to land cannot be separated or transferred independently of the land to which it belongs, as it is in the nature of a covenant running with the land.

399. **Ownership above and below surface.**—Land, in its ordinary legal sense, includes not only the soil or ground, but also everything that is permanently attached to it, such as buildings, trees, fences, and the like.[85] So the owner of a given parcel of land is regarded as owning from the center of the earth to the zenith unless his ownership has been restricted by express or implied conditions in the grant. But there may be several distinct interests, each owned by a separate person. There may be as many estates as there are separate and distinct interests which can be separated and specifically described, and each owner may have a fee simple in the particular interest which he has in the property. Thus, one person may be the owner of the surface, and another the owner of the minerals below the surface. That is, the ground may be divided into estates parallel to each other, one above the other.[86]

For example, there may be separate and distinct freehold interests in the different apartments or floors of a building. When a room or floor in a building is conveyed, no interest in the soil is conveyed, except in so far as the room must be supported by the soil. And if there is no agreement or covenant to rebuild by the grantor, and the room or building is

[85] Isham v. Morgan, 9 Conn. 374; 23 Am. Dec. 361.
[86] Lillibridge v. Lackawanna Coal Co., 143 Pa. 293.

destroyed by the elements, the owner of the room loses his freehold estate.[87] Where the deed makes no reservations, but simply conveys the land, everything passes, from the center of the earth to the zenith. All minerals are included in such a grant, so that if it is desired to reserve minerals below the ground, a special exception must be made in the deed.

But while the owner of the surface has rights over the space or air above the surface, and is entitled to use it by erecting buildings thereon, and if another person desires to use it, as by stretching wires across it, he must first obtain the permission of the owner of the surface, or be answerable in damages, yet the latter ownership is not the same as that of the surface of the ground. If anyone uses the air or space above the surface for twenty-one years, or the statutory period for obtaining prescriptive rights, adversely to the owner, he obtains an indefeasible title to such use the same as he would over the surface.[88]

400. **Aerolites belong to the owner of the land.**—It has been held that aerolites or meteoric stones falling from the sky are added to the land on which they fall, and the title to them is in the owner of the land.[89]

401. **Incidents that pass with a grant of minerals.**—When the owner of lands conveys to another some particular mineral or minerals, there passes, as ap-

[87] Thorn v. Wilson, 110 Ind. 325, 59 Am. Rep. 209; Corbett v. Hill, L. R. 9 Eq. Cas. 671 (Eng.).

[88] Mitchell v. Pease, 7 Cush, 350 (Mass.); Marvin v. Brewster Iron Min. Co., 55 N. Y. 538; Milton & Fisher v. Lambard, 51 Cal. 258. The right of passage over land in airships is discussed in a book by Harold D. Hazeltine, published by the University of London Press, in 1911.

[89] Goddard v. Winchell, 86 Iowa 71, 52 N. W. 1124.

purtenant to the grant, the right for the purchaser or his representatives to go upon the surface and sink a shaft for the purpose of finding the minerals and removing same. But the owner of the surface and the rest of the estate has the reserved right to sink a shaft through the stratum of mineral granted, for the purpose of reaching other substances, as oil or gas, which lie below that which was granted. In a Pennsylvania case the question was as to the right of the surface owner to sink a shaft through a stratum of coal which he had sold in order to reach gas and oil which were situated below the coal. The court held that when a person purchases the coal upon lands, he simply purchases for the time being the space which the coal occupies; that he is not the owner in fee of that space except for the length of time that is necessary for the removing of the coal which he has purchased. What he has bought is the coal and not any other part of the land. When the coal is all out the purchaser has no longer a right to use the space for the transportation of coal from other land, since this space belongs to the owner of the surface.[90]

Petroleum oil in place is a mineral, and may be conveyed separately from the soil the same as any other mineral. It is real property while in the earth.[91] All minerals are real property while in the earth, and become personal property as soon as they are detached therefrom.[92]

[90] Chartiers Block Coal Co. v. Mellon, 152 Pa. St. 286.

[91] Rupel v. Ohio Oil Co., 95 N. E. 225 (Ind.), LEADING ILLUSTRATIVE CASES.

[92] Barclay v. Wainwright, 86 Pa. St.191; Williamson v. Jones, 39 W. Va. 231.

Natural gas, so long as it remains in the soil, is considered as a mineral, but owing to its peculiar properties, it is liable to escape and pass to the land of another, in which case the original owner loses his estate therein.[93] So it has been held that where one person has the right to bore for petroleum and in doing so natural gas escapes through the opening thus made, he has the right to take the gas without being liable to account for it.[94] But it is possible that this holding should be revised to the extent of allowing the owner of the surface to recover the reasonable value of the mineral thus inadvertently secured.

402. **Rule when tree extends over the property line.**—When the trunk of a tree stands wholly upon the land of one person, and the branches project over the land of another and the roots of the tree extend into the soil of the other, it has been held that the fruit upon these branches which project over the land of the second party belongs to the owner of the land that the trunk of the tree stands on, but the other property owner may cut the branches and remove them if they constitute a nuisance. In one case an apple tree had been planted six feet from the boundary line and the roots and limbs of the tree extended beyond the boundary line, and the branches overhung the adjoining land. The owner of the land adjoining undertook to gather the fruit, on the ground that he owned the space where the branches extended and also that the roots gathered nourishment from his soil. But the court

[93] Cully v. Shirk, 131 Ind. 96; Tyner v. Peoples' Gas. Co., 131 Ind. 408.

[94] Wood County Petroleum Co. v. W. Va. Transportation Co., 26 W. Va. 210, 57 Am. Rep. 659.

held that the fruit belonged to the owner on whose land the trunk of the tree stood, though the adjoining owner could trim off the overhanging branches, if he stood upon his own land, without being a trespasser.[95]

A is not liable for trespass if he goes on B's land to take the fruit from his own tree unless B's land is so used that a real injury is done by going on it to pick the fruit. Where the fruit has fallen off there is a question whether there is a conversion. If B does not allow A to cut the fruit and B uses the fruit himself, that is a conversion. If trees are in a highway they belong to an adjoining owner except in cities where the streets belong to the city. Some courts hold that the parties are absolute owners of that part of the tree which stands upon their respective lands.[96] The fact that a boundary line tree, or one near a boundary line, is allowed to extend its branches over the adjoining land, is not such an adverse user of that land as will give the other owner an easement by prescription. The adjacent owner is regarded as simply tolerating a nuisance, and the mere existence of a nuisance for any length of time will not be allowed to create a prescriptive right.[97] The adjoining owner cannot lop off the projecting limbs unless they are a nuisance, but they may be considered as a nuisance if they do the least damage to the adjoining premises.

Since the entire tree belongs to the owner on whose land the trunk of the tree stands, the fruit of the

[95] Newton v. Poole, 12 Leigh 112 (Va.).
[96] Skinner v. Wilder, 38 Vt. 115; Lyman v. Hale, 11 Conn. 177.
[97] Chatham v. Brainerd, 11 Conn. 60.

tree belongs to him also. The owner of the trunk may gather the fruit of the whole tree from the branches if he can do so while standing upon his own premises; he is a trespasser if he goes upon his neighbor's land to gather the fruit. The fruit after it has dropped from the tree to the ground still belongs to the owner of the tree, and he may go upon his neighbor's land and pick up such fruit, or take other steps to recover it.[98] If the projecting branches are cut off they belong to the owner of the trunk, and he may recover them. These rules are somewhat arbitrary, and are seldom necessary to be applied, as the common sense and courtesy existing between adjoining property owners is usually sufficient to make a neighborly division of the fruits of such trees possible and satisfactory to both.

403. **Trees on boundary line.**—Where the tree stands so that the boundary line passes through its trunk it belongs to the adjoining owners in common, especially where it is a boundary tree. In one case a suit for damages was brought for cutting trees growing upon the boundary line. The court held that the trees were owned in common, and since they were so owned, if either party destroyed them, he was liable to the other party in damages for any injury he might sustain by the destruction of the trees.[99] In another case an injunction was granted restraining one party from cutting a tree so situated.[1]

[98] Newkirk v. Sabler, 9 Barb. 652 (N. Y.); Dunstall v. Dunstall, 2 Shower K. B. 27 (Eng.); Hoffman v. Armstrong, 48 N. Y. 201.

[99] Musch v. Burkhart, 83 Iowa 301; Griffin v. Bixby, 12 N. H. 454.

[1] Dubois v. Beaver, 25 N. Y. 123.

CHAPTER XXXVII.

FRUITS OF THE SOIL.

404. **Two classes of products of the soil—Fructus naturales and fructus industriales.**—The products of the soil are divided into two classes, and the rules governing each are somewhat different. This division was made at a time when the cultivation of the soil had not attained the system and perfection which it has today, or the courts would not have made such a radical distinction. The first class consists of those products growing naturally each year without the intervention of man, although some labor may be necessary to bring such products to perfection; they consist of nuts, fruits, berries, grasses, and the like, and are called fructus naturales. The second class consists of those crops or products which require an annual planting, as grains and vegetables, and the like, which are called fructus industriales, or emblements. In a Minnesota case it was held that hops, though seemingly belonging to the first class as they grow up naturally each year, still are classed with the second since they require poles to be set for the vines and some little attention to bring to perfection.[2] This was also the holding of the early common law, and the courts follow it. The first class, fructus naturales, are regarded as

[2] Sparrow v. Pond, 49 Minn. 412.

real property so long as they are attached to the soil, since they are products of nature arising from the soil without assistance from man; the second class, fructus industriales, are considered personal property. The first class of products become personal property when they are detached from the soil.

This distinction is important upon a levy of an execution, or in making a sale of such products. A constable cannot levy upon apples that are growing on the trees, since they are a part of the realty, because such officers are limited to levying upon the personal property only; but he may levy upon the crops of wheat, oats, vegetables and the like. So when the products of land are sold, the first class must be purchased with the formalities required to purchase realty, while the second class are purchasable as personalty.[3]

405. **Rule as to natural fruits of the soil.**—It is the general rule that natural fruits of the soil are an interest in land, and the sale or mortgage of such products must be in writing to satisfy the Statute of Frauds. Therefore, if it is desired to sell a crop of apples growing upon the trees it is necessary to go through the same formalities as to sell the trees themselves.[4] But in England, and in some of the states, whether such products are to be deemed an interest in land or not depends upon whether or not the parties intend that they shall be immediately severed from the land. If they are not to be severed immediately, then they are considered to constitute

[3] Rogers v. Elliott, 59 N. H. 201, 47 Am. Rep. 192.
[4] In re Chamberlain, 140 N. Y. 390; Kimball v. Sattley, 55 Vt. 285.

an interest in land; if there is to be an immediate severance, they are considered as already severed, and as personal property.[5]

406. **Annual crops or emblements are generally regarded as personalty.**—In this country the general rule is that emblements or annual crops are personal property, and are not an interest in land, so that they can be levied upon as personal property. Upon the death of the owner of the land, however, they go to the heir, though they are personal property, and would be covered by a real estate mortgage.[6] Annual crops, fructus industriales, are regarded as personal property to the extent that they may be levied upon as such, and sold by parol.[7]

When annual crops are ready for harvest they are regarded by some of the authorities as severed from the soil,[8] while others regard them as still a part of the soil, as between vendor and vendee of the land.[9] When such crops are sold on execution against the owner, or have been sold by the owner to another person, this sale is regarded as a severance of the crops, so that they would no longer pass with the land.[10] The right to emblements carries with it the right of entering upon and cultivating the land and harvesting the crops when ripe.

[5] Marshall v. Green, L. R. 1 C. P. Div. 35 (Eng.); Maenner v. Carroll, 46 Md. 193.

[6] Sparrow v. Pond, 49 Minn. 412; Reiff v. Reiff, 64 Pa. St. 134, LEADING ILLUSTRATIVE CASES.

[7] Swain v. Bussell, 10 Ind. 438; Wright v. Watson, 96 Ala. 536; Sherman v. Willett, 42 N. Y. 146.

[8] Donahue v. Klassner, 22 Mich. 252; Heavilon v. Heavilon, 29 Ind. 509.

[9] Everingham v. Braden, 58 Iowa 133; Powell v. Rich, 41 Ill. 466.

[10] Hatch v. Adams, 22 Fed. 434; Hershey v. Metzgar, 90 Pa. St. 217.

407. **On death of testator.**—Growing crops go to the devisee of land in a will and not to the executor. The crops in such a case are regarded as connected with and a part of the soil. But the will may provide that the crops shall be regarded as personal property, in which case they would go to the executor and not to the devisee of the land. But if the sale of the real estate becomes necessary to pay debts the administrator may sell it for that purpose, though at the early common law, the land could not be taken to pay debts, but went to the heir free from debts.[11]

408. **On sale of the realty.**—Growing crops generally are a part of the real estate to which they are attached and they follow the title to the land, so if the land is sold they follow the land to the grantee unless specially reserved. This also applies to the tenant of a mortgagor, as the purchaser on foreclosure in such case takes all crops growing on the land at the date of the foreclosure.[12] Although for purposes of sale of the land crops are generally held to pass with the land, still they may also be personal property as far as levy and sale under execution is concerned.

409. **Husband and wife.**—Where the husband cultivates crops on the wife's land they are the property of the wife, and if the land is held by entireties by the husband and wife, the crops raised are held in the same manner and are not subject to levy and sale under an execution against her husband.

[11] West v. Moore, 8 East 339 (Eng.); Pratte v. Coffman's Ex'r, 27 Mo. 424.

[12] Turner v. Cool, 23 Ind. 56.

410. **Landlord and tenant.**—Under the old feudal law if the tenant died between September first and March first the lord took the profits of the land for the year; if between March first and September first the heirs of the tenant took the profits. It is essential to entitle the tenant to the emblements that the crops should have been actually planted during his occupancy, and the mere preparation of the ground will not give him the fruits of seed planted by another. The tenancy must be terminated by act of God; if the tenant leaves the premises voluntarily, he has no right to emblements. In some parts of the United States where the tenant plants the crops he is entitled to them when his term expires before the harvest. These are what are known as "Away-going crops," which have been defined to be "the crop sown during the last year of tenancy, but not ripe until after its expiration." This right often arises by custom, in which case it is as binding as though inserted in the lease.[18]

411. **Trespassers.**—If a trespasser sows crops they belong to the owner of the land on which they are sown, but if he succeeds in gathering the crops then the crops become the personal property of the trespasser, for he grew them himself. On the other hand, if the crops are natural rather than industrial crops, as grass or fruits from trees, the trespasser acquires no title by harvesting them.

412. **Crops covered by mortgage.**—But a real property mortgage covers not only the land but all crops growing upon the land. Under the Massachu-

[18] Clark v. Harvey, 54 Pa. St. 142.

setts rule, the mortgagor may remove the crops before default; and under the New York rule he may remove them prior to foreclosure of the mortgage. When the mortgage is actually foreclosed, the crops growing at the time of the sale and foreclosure proceedings belong to the purchaser without reference to whether they were planted before or after default.[14] Crops planted by a lessee of the land belong to the purchaser under a foreclosure sale. The lessee is regarded as taking subject to the mortgage, and if he plants crops he must remove them before title passes under the mortgage to the mortgagee.[15]

It does not matter whether the foreclosure is at law or in equity, the same rule prevails in each case. The crops, as well as all fixtures upon the land, go to the purchaser under a foreclosure sale. Then where the mortgagor is in possession with a right to redeem within a period fixed by statute, he can remove the growing crops until his right to redeem expires.[16] While the mortgage is a mere lien, all crops severed by the mortgagor before actual foreclosure belong to him, and he may make such severance by sale of the crops.[17] But this rule may change if the crops are not ready to harvest.[18] A crop to be planted may be mortgaged and this mortgage will become effective and the lien attach as soon as the crop grows.

[14] Ruggles v. First Nat. Bank of Centreville, 43 Mich. 192; Mut. Life Ins. Co. v. Bigler, 79 N. Y. 568; Woehler v. Endter, 46 Wis. 301; Frink v. Roe, 70 Cal. 296.

[15] Lane v. King, 8 Wend. 584 (N. Y.); Stanbrough v. Cook, 83 Iowa 705.

[16] Bank v. Swan, 2 N. Dak. 225; Nutting v. McCutcheon, 5 Minn. 382.

[17] Rollins v. Keel, 115 N. C. 68; Nat. Bank v. Beegle, 52 Kan. 709.

[18] Collins v. Gordon, 122 Mich. 665.

413. **Trees and shrubbery.**—Nursery trees and shrubbery, although planted with the intention of removal, are regarded as part of the realty, and unless reserved, will be covered by a mortgage on the realty, and will pass to the vendee upon a sale of the realty.[19] Fallen trees and timber that has been cut down pass to the vendee of land by deed if there is no exception or reservation made in the deed.[20] But if in addition to being cut down the trees have been cut into logs, timbers, or fire wood ready for market, they then become personal property, and a sale of the land does not convey to the purchaser any title to such property, and the former owner of the land may go upon the land and remove such wood or timber. The proper form in such case, and where it is desired to retain some portion of the estate, is to use the word "excepted," as, "except the standing trees," "except the minerals," and the like, which exception keeps the property thus excepted out of the grant, or simply conveys the rest of the property.

When standing trees are excepted from a grant, and it is further provided that such timber shall be cut and removed within a specified time, this stipulation must be observed or the right will be lost.[21] If no time is specified in which the trees are to be cut and removed, they are to be cut and removed within a reasonable time, and if they are not so cut and taken away within a reasonable time after the owner of the land notifies the exceptor to do so, the trees

[19] Burrows v. Stryker, 47 Iowa 477; Smith v. Chapell, 31 Conn. 589.
[20] Brackett v. Goddard, 54 Me. 309; Cook v. Whiting, 16 Ill. 480.
[21] Saltonstall v. Little, 90 Pa. St. 422.

will be forfeited to the owner of the land. The rule as to reasonable time is implied where the parties have set no time, and is usually a reasonable time after notice given by the owner of the land.

414. **Standing forest trees are a part of the realty.**—Forest trees while standing are a part of the realty and are regarded as realty to the extent that a grant of them must be made in writing to satisfy the requirements of the Statute of Frauds. But while it is generally held that a parol or oral sale of standing trees passes no title, yet it is good as a license for the removal of the trees that are cut previous to a revocation of the grant or lease.[22] And where lands are sold by deed and there is a parol reservation of standing trees, this reservation is within the Statute of Frauds, and invalid. But if the reservation is made in the deed, the title to the trees does not pass.

[22] United Society v. Brooks, 145 Mass. 410; White v. King, 87 Mich. 107; Cockrill v. Downey, 4 Kan. 427, LEADING ILLUSTRATIVE CASES.

CHAPTER XXXVIII.

WASTE.

415. **Definitions.**—Waste may be defined as any permanent injury done or permitted by the tenant of an estate less than a fee to the inheritance. Waste may be either legal or equitable. Legal waste covers all acts considered in law to be waste, and equitable waste includes malicious acts by a tenant without impeachment of waste. Legal waste is either voluntary or active on the one hand, or permissive on the other. Voluntary waste consists in some positive act injuring the property, while permissive waste consists in mere neglect.

416. **Equitable waste.**—The expression commonly used in leases, "without impeachment of waste," means that there shall not be any action brought by reason of anything done by the lessee.[28]

An action of "case" would not lie where a life tenant stripped a building of all its fixtures where he was without impeachment of waste, as at common law the phrase "without impeachment of waste" afforded a perfect defense in such an action. This drove the reversioner into equity and gave rise to equitable waste, which is, today, the ordinary remedy. Equitable waste lies where there is no remedy except in equity. In equity it has been laid down

[28] Duncombe v. Felt, 81 Mich. 332, 45 N. W. 1004, LEADING ILLUSTRATIVE CASES.

that the tenant cannot commit malicious or humorsome waste, but must treat the premises as a reasonable man would, even though he is a tenant without impeachment. For example, if a tenant for life cuts young trees foolishly and damages the estate and there is no corresponding benefit, this would be a case of equitable waste. If the property was all timber land, he might well cut a reasonable amount of timber, even though he was not without impeachment of waste.

417. **Liberal construction of waste in this country.**—In this country there is a strong inclination to amplify the privileges of the life tenant. As there are in this country such vast tracts of unimproved land which would otherwise lie dormant in the hands of a life tenant, public policy requires that the doctrine of waste should be liberally construed. Many acts which in England would be waste are not waste in this country and it often becomes a question for the jury in each case to determine whether a certain act is or is not waste.

418. **Tenant's implied duty to repair.**—In every lease there is, unless excluded by the operation of some expressed covenant or agreement, an implied obligation on the part of the lessee so to use the property as not unnecessarily to injure it, to treat the premises in such manner that no injury be done to the inheritance, but that the estate may revert to the lessor undeteriorated by willful or negligent conduct of the lessee.[24] A tenant from year to year is not liable to make good the mere wear and tear

[24] United States v. Bostwick, 94 U. S. 53.

of the premises, but he is obliged to keep the house wind- and watertight. However, a tenant for years or for life is bound to keep the premises in repair, whether there is such a stipulation in the lease or not. If a house is in bad condition when the tenant takes possession he will not become liable by suffering it to remain so, though if there is timber on the premises he may use it for repairing the house.

A life tenant may be liable if he permits a house or fences on the premises to fall into decay when it might be prevented by the use of reasonable diligence. Decay, however, is often so gradual that it is difficult to determine when a tenant is bound to begin to repair, or how far he shall go in making repairs in any given case. If a tenant erect a new house he is bound to keep it in repair, as he would a house standing when he entered.

419. **Liability of tenant at will to repair.**—Even a tenant at will is bound to make fair and reasonable repairs, but is not bound to put a new roof on an old house. A tenant at will, however, is not liable for permissive waste. But if he is a tenant at will for a fixed annual rent, he becomes a tenant from year to year and is liable for fair and tenantable repair. Breaking a window, for example, is not permissive waste, but is actual waste. It is the common custom now in some places that the landlord is to make outside repairs and the tenant make inside repairs, but it is very doubtful how far this custom is settled law.

420. **Cutting timber.**—One kind of waste is the injuring of growing trees by cutting them or lopping

off their limbs. Large trees like oak, ash and elm are considered timber trees in all places, but smaller trees like the willow or hazel or what is known as underbrush are never so regarded. Yet if these latter trees are standing to protect the house or land it may be waste to cut them, as in the case of a hedge or shade trees or ornamental or fruit trees, unless the fruit trees are past bearing. So it is not waste to cut and remove dead or dying timber to clear the land and give the young trees a chance to grow.[25] In some places it may be a valid custom for the tenant to cut oak trees for fire wood, although it would be waste to cut them and sell them for timber, even if the money so gained were applied to the purchase of fire wood for the use of the tenant.[26] The rights of a doweress vary in different states, although it seems to be universally held that she may cut timber where that has been a customary source of profit.[27]

The question in the United States whether cutting trees is waste seems to depend upon the question whether the act is such as a prudent farmer would do with his own land, having regard to the land as an inheritance, and whether doing it would diminish the value of the land as an estate.[28]

421. **Alterations in premises.**—It is not waste to erect a new house on land where there was not any before; and opening a way for the convenience of the tenant, or draining the land, is not waste. Raising the land by carrying upon it large quantities of

[25] Keeler v. Eastman, 11 Vt. 293.
[26] Padelford v. Padelford, 7 Pick. 152 (Mass.).
[27] White v. Cutler, 17 Pick. 248 (Mass.).
[28] Washburn, Real Property (6th ed.), p. 108.

earth is not waste in this country. Cutting a door in a house where it does no actual injury is not waste, for the proper test in all such changes in a dwelling house is whether the act injures the inheritance. The guiding principle is that the landlord must be able to use the land as he was able to use it before. So a landlord may obtain an injunction to prevent the defendant from building a brewery on the leased land in place of a dwelling house. The landlord has a right to exercise his own judgment and caprice as to what permanent structure shall be on his property and the tenant is not allowed to pull down a house, even if the new building is worth more.

422. **Changing nature of use.**—The general rule of law respecting waste is that the act must be prejudicial to the inheritance. It was held in some early cases in England that the tenant could not change the nature of the property, although the alteration might be to the profit of the lessor. The reason given was that such acts change the course of husbandry and the evidences of title. Such reasons are not applicable in this country. It has been the constant usage of our farmers to break up their grasslands for the purpose of raising crops by tillage and lay them down again to grass and change the use of the land as occasion required. In this country such changes can have no effect on the evidence of title on account of our system of deeds and registries of deeds. Waste will not lie where there is no real damage to the property, as for converting meadowland to garden ground. If the owner prefers to have

a field arable and the tenant changes it to pasture land, it is easily changed back and there is only nominal damage or none at all. On the other hand, if there was a house on the land and the tenant tears it down and builds a factory in its place, that is waste, as the original use is destroyed, and the owner may want to live again upon the premises. This is not a mere question of market value alone. It may be waste to allow pasture land to become overgrown with brush or to impoverish land by injurious tillage from year to year, or to remove the manure made on the premises in the ordinary course of husbandry.

423. **Removal of structures erected by tenants.**—It is sometimes a question how far tenants will be liable for removing structures which they erect themselves. The test seems to be whether the structures are a permanent addition to the freehold or not, as permanent improvements become a part of the inheritance and even if erected by the life tenant he may not remove them.

424. **Fire.**—If there is a lease and B covenants under the lease to pay rent and keep the house in repair, and the house is burned by accident or by a third party, the lessee is liable under the covenant. Leases generally today contain provisions exempting the lessee from liability for accident or the act of outsiders; otherwise the lessee would be liable. Suppose B covenants to pay rent and the house is burned and nothing is said of repair, B is liable for the rent, as the lease is still there. Suppose, on the other hand, a man leases an office in the third story of a building, and the building is burned, under the

English rule the lessee would still be liable, but in this country he would not be liable where the property leased has entirely disappeared.

425. **Mines.**—At common law the opening and working by a tenant for years of a mine not opened in the lifetime of the previous tenant in fee is an undoubted waste of the estate, and the tenant for life liable for waste cannot open a new mine. Where some mines are open and some not, the open mines only can be worked. A mine not worked for a year or two years must still be considered an open one. A mine which has not been worked for a hundred years would probably not be so treated. It has been held in England that a mine which had not been worked for twenty or thirty years on account of the loss of profit from working it, might without committing waste be worked again by a succeeding tenant for life. But if the working of the mine had been abandoned by the owner of the inheritance many years previously with a view to some advantage which he considered would accompany such discontinuance apart from the profit to be made by the sale of the mineral, the succeeding tenant for life could probably not treat this as an open mine.[29] When a mine or quarry is once opened so that the owner of an estate impeachable for waste may work it, the sinking of a new pit on the same vein or breaking ground in a new place of the same lot is not necessarily the opening of a new mine or quarry.[30]

426. **Same subject.**—It is not necessary, in order

[29] Bagot v. Bagot, 32 Beav. 509 (Eng.).

[30] Elias v. Snowdon Slate Quarries Co., L. R. 4 A. C. 454 (Eng.).

to render the mine an open one so that the tenant for life can work it, that the produce of such mine or quarry has been previously marketed and sold. If a mine has been previously worked for profit that must ordinarily be decisive of the right to continue working it. But the actual sale of the ore is not a necessary criterion of the difference between a mine or quarry which is and one which is not to be considered open in a legal sense.[31] It is sufficient, in this country, to show that openings were made and ore taken out with a view to profit and it is wholly immaterial whether the ore was used for some commercial purpose or not. The length of time during which the cessation of the working of the mine continued is immaterial so long as the fact of abandonment is not established.

427. **Abandonment of mines.**—In England the life tenant has a right to use a mine for his own profit where the owner of the fee in his lifetime has opened it even though he may have discontinued working upon it for a long period of years. The rule by which the right of a life tenant is to be tested is not the length of time that may have elapsed since the last working of the mine, but it depends upon whether the owner of the fee merely discontinued the work for want of capital or because it did not prove profitable, or whether he abandoned it with an executed intention to devote the land to some other use. A mere cessation of work for however long a period will not defeat the right of the life tenant, but an abandonment for a day with a view

[31] Elias v. Snowdon Slate Quarries Co., L. R. 4 A. C. 454 (Eng.).

to some advantage to the property would extinguish any claim on the part of the life tenant. For example, if the owner of the fee should sink a shaft and afterwards erect a dwelling house over it, or if he should fill it up and devote the space to agricultural purposes, it would indicate so clearly his intention to devote his estate to other uses than mining that the life tenant could not base any right upon the prior opening.[32]

428. **Actions.**—Suppose a tenant at will had torn down one house and allowed another to rot, he would be liable in trespass for voluntary waste of the house he tore down and liable in an action for permissive waste of the house that deteriorated. Waste is purely a statutory offense and not an offense at common law. There is no remedy at common law for permissive waste of a tenant at will as there has been no trespass. At the present time a bill in equity is a proper process and may be brought by anyone who may bring an action in tort.

[32] Gaines v. Green Pond etc. Co., 33 N. J. Eq. 603.

CHAPTER XXXIX.

BOUNDARIES.

429. **Importance of certainty in boundaries—Ambiguities.**—One of the first cares of the cautious buyer of property is to make certain that his land is so designated that there can be no question as to just what land he has purchased. He should carefully examine his deed in the first place and see that on its face there is no uncertainty or error. He should follow the description as given in the deed, noticing whether the directions and distances correspond with each other so that together they make one piece of land. He should notice whether all sides of his land are described and should calculate whether the sides are so described that they meet. Any failure in a deed in this respect is called a patent ambiguity. The buyer should then go on the ground and ascertain, preferably by means of an accurate survey, whether the description in the deed corresponds to the condition of the property, whether the monuments are fixed and certain and whether the distances between them correspond to the distances in the deed. Any discrepancy between the deed and the monuments on the land is called a latent ambiguity.

430. **Patent and latent ambiguities.**—There is a distinction between a latent ambiguity and a patent

ambiguity in a deed. A patent ambiguity is where it is evident on the face of the deed that the description is vague and indefinite. As for example, if a deed is drawn to cover "the greater part of my wood lot" it is evident that this deed is so indefinite that it can pass nothing. On the other hand, a latent ambiguity is where the deed on its face appears to be sufficient, but on applying the deed to the land it then becomes uncertain just what the parties intended. For example, if the deed is to run from a certain street corner northerly 100 feet and on going over the land it is found that the grantor only owned in that direction 75 feet, but that he owned in another direction, as easterly, 100 feet and that the fence of the parties ran at that place northeasterly, that would raise a latent ambiguity.

431. **Boundaries fixed by acts of the parties.**— Where monuments are referred to and are laid out after the deed is drawn in accordance with acts of the parties going over the land and surveying it, the parties are then bound by the monuments which they set up.[88] A parol agreement between adjoining landowners as to the location of a disputed boundary, followed by acquiescence in possession according to the agreement is binding. If the description in the deed is ambiguous, such an agreement is not within the Statute of Frauds, as it involves no transfer of title, but merely an application of the language of the instrument. But if the description is clear, the agreement is avoided by the statute, as it involves an actual transfer of land. Yet it has been held that

[88] Price v. De Reyes, 119 Pac. 893, 161 Cal. 484.

a line thus marked out and acted upon is conclusive, even when the description is certain. It seems just that the original parties or a purchaser with notice should be estopped from disputing the validity of such an agreement, but it is difficult to see how a purchaser who acted in reliance on the deeds without notice of the agreement could be affected by it.

Where a fence has been built as a division fence, the question is as to the intention of the parties to be ascertained from the language of the deed. If the deed is so clear that it may be traced on the land, then the deed must govern, but when from the courses, distances or quantity of land given in a deed, it is uncertain precisely where a particular line is located, the contemporaneous acts of the parties in anticipation of a deed to be made in conformity therewith or of a line given in a deed are admissible to show what land is to be embraced in the deed.

432. **Evidence to locate boundaries.**—Questions of boundaries are always concerned with the parol evidence rule. A conveyance of land can only be by deed and parol evidence is not admissible to control or vary a deed. If the description in the deed is certain, it is not competent to prove that the parties had anything in mind different from that expressed, but if on applying the deed to the land it is found to be ambiguous, parol evidence of the surrounding circumstances and of the acts of the parties is competent to aid in the interpretation of the deed and to enable the court to ascertain what was the intention of the parties in the words which they have used.[34]

[34] Hale v. Ball, 70 Wash. 435, 126 Pac. 942.

433. **Statutory methods of determining boundaries.**—There are statutory methods in most of the states for determining boundary lines and for the appointment of certain statutory officers to certify the true lines. In some states, however, the courts have been given jurisdiction for this purpose. But such proceedings are usually not judicial in character but are ministerial.

434. **Natural monuments.**—Natural monuments are permanent objects placed upon the land by nature like rivers, lakes, ponds, mountains, trees, rocks, etc. Wherever natural monuments can be found they control both courses and distances and the area named in the deed.[35] The fact that such monuments were not actually seen by the parties is immaterial. It must be determined, however, where the monuments were at the time the deed was made. For example, where the description refers to natural monuments and refers at the same time to township and section numbers, the boundaries must be determined by natural monuments although different from the government surveys.[36] The old custom of locating corners by trees or rocks, described generally as "the large oak tree" or "the pointed rock beyond the swamp" or other similar descriptions, is very confusing and should be avoided, as such monuments may alter in course of time, or it may be later impossible to ascertain which tree or which rock was intended.

[35] United States v. Sutter, 21 How. 170 (U. S.); Stacy v Ritter Lumber Co., 114 Va. 133, 75 S. E. 1038 (Va.).

[36] Johnson v. Archibald, 78 Tex. 96.

435. **Whether monuments, courses or distances prevail.**—When the boundaries of land are fixed by known and unquestionable monuments, the monuments govern although neither the courses nor the distances nor the area correspond with them. As to these latter matters the reason for the rule seems to be that surveyors may make mistakes, whereas the fixed monuments remain and about them there can be no dispute or uncertainty. Wherever there is any uncertainty this must be governed by the monuments when these are undisputed. It seems to be a question of fact in each case whether courses or distances prevail and the only rule that can be laid down is that whichever is given more particularly will govern. So if a line is mentioned in a deed as northerly 114 feet 6 inches that distance will prevail, although the line may not run exactly north, in order to make that exact distance. A natural monument will control an artificial monument where the two conflict unless the artificial monument appears to be the more correct, as where there may be some doubt as to the identity of the natural monument. Where the corners are lost and cannot be ascertained or where a lot is bounded by monuments which cannot be found, the courses and distances determine the location.

436. **Whether line runs to center of monument.**—Whenever the land is described as bounded by other land or by a building or structure, the name of which includes the title in the land of which it has been made the object, as in the case of a house, a mill, a wharf or the like, the site of the land or structure referred to as the boundary is the limit of the grant.

But when the boundary line is described only by an object, whether natural or artificial, the name of which is used in ordinary speech as defining a boundary, but not as describing a title in fee, and which does not in its course or nature include the earth as far down as the grantor owns and yet which has width, as in the case of a way, a river, a ditch, a wall, a fence, a tree, a stake, or stones, then the center of the thing so running over or standing on the land is the boundary of the lot granted.[37]

437. **Measuring from building.**—Where a building is a monument and the line is a certain distance from the side of the building, this may mean from the edge of the eaves[38] or that distance from the corner board and not from the outer edge of the eaves.[39]

438. **Boundary on highway.**—The ordinary legal presumption is that the owner of the land abutting on a road owns to the middle of the highway unless the language used clearly excludes it. So where one conveys land adjoining to or bounded upon a highway the law presumes the party intended to convey to the middle of the highway. General expressions like "to a highway," or "upon a highway," or "along a highway," are presumed to cover to the center of a road. The reasons for this rule are stronger in the case of a public way than in that of a private way. But the rule applies to both public and private ways. The question is one of intention. The grantee

[37] Boston v. Richardson, 13 Allen 146, 154, 155 (Mass.).
[38] Millett v. Fowle, 8 Cush. 150 (Mass.).
[39] Center Street Church v. Machias Hotel Co., 51 Me. 413.

owns a fee to the center of a private way the same as in a public road, so where there is a deed "bounded easterly on the road or leading way from my dwelling house to the old post road" the grantee takes to the center of this way.[40]

439. **Boundary on street where distances reach only to edge of street.**—Where a deed is given to a street and then along the side of the street, this should, according to the better view, mean to the center of the street, even where the measurements given correspond to the side of the street, and even though monuments referred to are on the side. It is impossible to place monuments in the center of the street, and they must be, therefore, at the side of a street or a stream, so that their exact location is not of any particular assistance on this question. If this were not the rule there would be various strips of land under the street of practically no value held by owners who could have no interest in them and the result would be very inconvenient.[41]

The wiser rule seems to be that where land is conveyed even on an intended street by a lot numbered with measurements which pass to the edge of the street, that the grantee still gets to the center, as there can be no difference in the intention of the parties between a street on a map and on a public highway as between the grantor and the grantee. The grantor in such case dedicates the street to the use of the grantee as a street, so a grantor cannot claim it is not a street. This is a matter of construc-

[40] Fisher v. Smith, 9 Gray 441 (Mass.).
[41] Cox v. Freedley, 33 Pa. St. 124.

tion of the deed and the presumption that the grantor intended to convey to the center of the street is called in aid of the deed.[42] The expression "to the road and thence along the road" is always taken to mean the center of the road, even where the measurements are to the side and even where monuments on the side of the road are referred to. Where the deed says expressly "to the side of the road," there is a great conflict of authority.[43]

440. **Where street is on edge of lot and wholly on land of one owner.**—Where a street is laid wholly on the land of the grantor on the margin of his tract so that he owns nothing beyond, the question arises whether the whole of the street opposite the lot passes to a grantee of the original proprietor. It is uniformly held that in this case the fee to the whole street passes to the grantee, as otherwise the fee to a mere strip would be left in the grantor of no particular use to him.[44] On the other hand, where the street is laid along a river which has valuable water and wharf rights, the owner of a lot on the land side of this street only takes to the center of it, as it cannot have been intended that he should ever have taken all these valuable water rights.[45] Where a passageway is laid along a boundary of a man's land and he owns no land on one side of the passageway and the owner subsequently gives a deed bounding

[42] Bissell v. Railroad, 27 N. Y. 61; contra, Leigh v. Jack, 5 Exch. Div. 246 (Eng.); Pratt v. Quirk, 119 Minn. 316, 138 N. W. 38, LEADING ILLUSTRATIVE CASES.

[43] See Buck v. Squiers, 22 Vt. 484; Cox v. Freedley, 33 Pa. St. 124; Hamlin v. Pairpoint Mfg. Co., 141 Mass. 51.

[44] In re Robbins, 34 Minn. 99.

[45] Brisbine v. St. Paul, etc., Railroad, 23 Minn. 114, 130.

the land "on the passageway," it is commonly held that a fee in the whole of the passageway passes to the grantee.[46] This rule is a wise rule of convenience, for it obviates leaving strips of land of no value.

441. **Boundary on street not constructed.**—There is a doctrine that where land conveyed is bounded on a highway it extends to the center of the highway, but where it is bounded on a street or way existing only by designation on a plan or as marked upon the earth it does not extend to the center of the way. Of course where the street is marked on a plan and later is dedicated to the public by opening the street, this rule does not apply and the conveyance then goes to the center of the street.[47] The better opinion, however, is opposed to the above rule and holds that the grantee takes to the center, whether the street is actually laid out upon the land or not.

442. **Title to highway never appurtenant to abutting owner.**—The title to the highway cannot pass as appurtenant to the abutting owner and so where the land is clearly described as excepting the road from a description such land cannot pass as appurtenant to the adjoining land. The title to the land in the roadway is not an easement, but it is a fee in a distinct parcel of land which cannot pass as appurtenant to another distinct parcel.[48]

443. **When street vacated.**—Where A conveys to B two lots abutting on a street which had been vacated by the city, the court holds that B takes only

[46] Haberman v. Baker, 128 N. Y. 253; In re Robbins, 34 Minn. 99; contra, Gould v. Wagner, 196 Mass. 270.

[47] Bangor House Proprietary v. Brown, 33 Me. 309.

[48] Buck v. Squiers, 22 Vt. 484.

to the edge of the street.[49] This case seems to be opposed to the general principle that a deed passes title to the center of the street, as the same considerations which are the basis of this rule apply to streets which have been closed.[50]

444. **Boundary on river.**—A river is a monument and, like a tree, a stake, a stone, or any other monument, controls. The monument is to be considered as located equally on the land granted and the land of the adjoining owner. The center of the monument is the boundary and the grant extends to that point. The rules are the same on an artificial as on a natural stream.[51] A boundary on a river commonly passes the land under the water to the center of the stream and the intention of the grantor to limit the grant to the side of the stream must be clear. The ordinary proper words to give the grantee the land to the center of the stream are "to the river and thence along the river." Where a stream is referred to as the boundary, the boundary follows its course, but where the distance along a stream is specified, this distance may be determined by a straight line rather than by following the meander line of the river.

445. **Boundary on lake or pond.**—A boundary line on a natural lake or pond would seem to run only to low water mark, but in some cases of non-navigable ponds it has been held that the boundary extends to the center of the lake.[52] The line on the Great

[49] White v. Jefferson, 110 Minn. 276, 124 N. W. 373; In re Schmeidel's Estate, 137 N. W. 1110.

[50] Paine v. Consumers' Forwarding & Storage Co., 71 Fed. 626.

[51] Agawam Canal Company v. Edwards, 36 Conn. 476.

[52] Mitchell v. Smale, 140 U. S. 406; Hardin v. Jordan, 140 U. S. 371.

Lakes, for example, is the usual low water mark and does not extend to the middle of the lake, while if the lake is artificially formed by a dam or other similar means, the boundary extends to the middle of the lake. If a natural lake or pond is raised or lowered artificially, the boundary line will remain at the original low water mark.[53] When the deed runs to the bank of a lake or pond, the landowner cannot claim any land under the water,[54] and the same result is reached where a deed describes land by metes and bounds without reference to the lake.

446. **Division of land under water.**—Where there are contiguous riparian owners of lands running along the shores of a navigable lake the theory is that each landowner is entitled to a portion of the flats or non-navigable portion of the lake. This may be indicated by surveying the meander line of the navigable water and then drawing straight lines from the shore boundaries to points on the meander line proportionate to the distance between the shore boundaries.[55] Another rule is as follows: "Draw a line along the main channel in the direction of the general course of the current in front of the two estates, and from the line so drawn at right angles with it draw a line to meet the original division line on the shore."[56] The usual rule is, however, that the boundaries of the land of riparian owners under a body of water extend at right angles from the thread of the stream to the end of the side lines on shore.

[53] Paine v. Woods, 108 Mass. 160.
[54] Holden v. Chandler, 61 Vt. 291.
[55] Blodgett & Davis Lumber Co. v. Peters, 87 Mich. 498.
[56] Thornton v. Grant, 10 R. I. 477.

CHAPTER XL.

FENCES.

447. **Nature of obligation to fence.**—A servient tenant is one who has the burden of an easement and he is not ordinarily required to do anything, he is not called upon for action, the only exception to this rule being in the case of fencing easements. The obligation to maintain a fence by prescription or agreement is generally classed as an easement, though it is sometimes called a "spurious easement," and has been called "a right in the nature of an easement." A fence is a part of the freehold, even though it is attached to the land only by its own weight, and on alienation it passes with the land.[57]

448. **Creation of obligation to fence.**—The obligation to fence as applied to neighbors did not exist at common law, but can arise in either one of two ways, either by agreement or by prescription. It is held in this country, however, that the common law rule that the owner of cattle is bound at his peril to keep them on his own land is not applicable to the grazing lands of the West. The landowners there are required to enclose their land with a sufficient fence if they would keep off cattle.[58] There is an exception as to dangerous animals or diseased animals and the

[57] Ivins v. Ackerson, 38 N. J. Law 220; Mott v. Palmer, 1 N. Y. 564, LEADING ILLUSTRATIVE CASES.

[58] Buford v. Houtz, 133 U. S. 320.

owner is bound at his peril to keep such animals from doing injury, even on the grazing lands.

449. **By custom.**—There is a very early case where a landowner brought an action of trespass on account of cattle coming upon his land and the court sustained a plea that it was immemorial custom that this landowner should keep up a hedge to prevent the cattle from crossing the land and that he had failed to do so.[59] An obligation by custom to fence is, however, unknown in this country, as rights by custom are unknown here.

450. **By prescription.**—It has been settled in England from early times and never denied that an obligation of the owner of land to fence against the land adjoining may be established by prescription, and if so established is a charge upon his land. Such a right has been called a right in the nature of a grant of a distinct easement affecting the land of the grantor. However, where a landowner keeps up a border fence for his own benefit this does not raise a presumption of prescription. Such a landowner might take down the fence for a few days from time to time to prevent the acquisition of prescriptive rights, but such a course would seem unnecessary in the ordinary case.

451. **As covenant running with land.**—The question frequently arises where there has been a conveyance of land as to whether an agreement to fence runs and binds the grantee of the land. If A, for example, has a right of way over land of B and B is disseised and a squatter gets possession, A still

[59] Anonymous, Gray, Cases on Real Property (1st ed.), vol. II, p. 323.

has a right of way over this land.[60] A deed poll is a deed not signed by the grantee, but it is held that a stipulation even in such a deed is binding upon the grantee, as when he accepts the deed he is presumed to agree to the obligation to fence. Where the owners of land agreed to convey it to the defendant on the express condition that the defendant should build a fence on the eastern side of the land before taking possession, and the defendant later granted his land bordering on the eastern line of this tract to the plaintiff, the court holds that the condition of fencing is a covenant running with the land and that the plaintiff is entitled to recover for injury to his cattle caused by the defendant's failure to fence.[61] But this case seems to be opposed to the current of decisions, as there was no covenant in the true sense and the writing was unsealed. There had been no conveyance between the covenantee and the covenantor.

452. **Fence along highway.**—At common law the owner of land is under no obligation to fence against cattle on the highway, but every man is bound to keep his own cattle on his own property and prevent them from going on the land of his neighbor. The only exception to this is as to cattle being properly driven upon the highway which occasionally wander upon unfenced land, but if they are removed with reasonable promptness there is no liability on account of their acts.

453. **Railroad fences.**—A railroad company is

[60] Bronson v. Coffin, 108 Mass. 175, 118 Mass. 156.

[61] Indianapolis, etc., Co. v. Harbough, 38 Ind. App. 115, 78 N. E. 80.

under no obligation to fence its track unless there is some agreement to do so or some statute expressly covering the matter. But statutes have been quite generally passed in this country requiring railroads to build and maintain fences sufficient to keep out the cattle of the adjoining owners.

454. **Proper kind of fence.**—The usual purpose of fences is to restrain animals from trespassing on lands of others and they also serve the purpose of marking the boundaries. A fence may commonly consist of any material that will serve its purpose and this is the only test of the sufficiency of a fence unless the statute plainly defines what is necessary. A fence should be not unreasonably dangerous to animals and persons who may approach it, but it is generally held that maintaining a barbed wire fence does not in itself constitute negligence and that no liability can be incurred by building and maintaining it.[62]

455. **Statutes.**—The subject of division fences is now so generally covered by statute that no very general statement can be made in regard to it. Statutes commonly provide for the building and maintaining of fences under control of impartial persons, sometimes called fence viewers, and that adjoining owners shall share proportionately the expense of the fence.[63] A fencing statute merely takes away the remedy for injuries done by animals upon land unfenced and can, of course, impose no direct obligation on the landowner to build fences.

[62] Panther v. Trauman, 89 Iowa 101; Mullen v. Renzleman, 31 Okl. 53, 119 Pac. 641, LEADING ILLUSTRATIVE CASES.

[63] See for example, Griffith v. Carrothers, 86 Kan. 93, 119 Pac. 548.

PART III

USE AND ENJOYMENT OF LAND OF ANOTHER

CHAPTER XLI.

NATURAL RIGHTS TO AIR AND WATER.

456. **Natural right defined.**—One difference between a natural right and an easement is that an easement arises by grant of some kind and is extinguished by a unity of possession of the two parcels of land, while a right cannot be had by one man against himself and still the right is not extinguished by a unity of possession but revives when the portions of the land are separated. So the right to have a water course flow past a man's land cannot be extinguished by the unity of possession between the upper and the lower owner.

457. **Right to light by prescription.**—Rights by prescription are always founded in this country on the theory that the landowner has been injured in some way and that the injury has been of such a character that he might have immediate redress by action and that he has brought no action, and that the injury has continued throughout the statutory period. Of such nature are rights by prescription in ways, commons, markets, water courses, etc. But

the English doctrine that a prescriptive right of air to maintain a window can be thus acquired has no place in this country. Our courts find that there is no adverse user in case of lights or any use whatever of another's property, and, therefore, no foundation is laid for indulging in the presumption against the rightful owner. The exercise of a lawful right on his own land for twenty years would seem to give a landowner no beneficial interest in the land of his neighbor.[64]

458. **English rule of acquisition of easement of light by prescription.**—It is held in England that in order to acquire an easement of light under the Prescription Act the user need not be of right but need only be actual for the prescriptive period, and that hence one tenant can prescribe for such an easement as against another under a common landlord. The easement of light is, therefore, quite different from ordinary easements and need not be adverse to the land. So a unity of seisin will prevent the acquisition of the ordinary easement and a merger of the two estates in fee simple but without unity of possession will work an extinction of the easement of light.[65]

459. **Right to light by express or implied agreement.**—The rule seems to be well settled in England that an easement of light and air will be implied from the grant of a house having windows overlooking land retained by the grantor. This doctrine has been repudiated in Massachusetts and only allowed on

[64] Parker v. Foote, 19 Wend. 309 (N. Y.).
[65] Richardson v. Graham (1908) 1 K. B. 39 (Eng.).

strict necessity in Connecticut; and the English rule seems only to have been followed in Maryland and New Jersey.[66] An easement of light may, of course, be created in this country by agreement and would be an equitable easement which binds only a purchaser with notice. If one conveys land and retains the house, there would not be an implied reservation of light. There may be rights against the construction by a neighbor of a "spite fence" purely out of malice.[67]

460. **No right to light by prescription in this country.**—In England the right to light and air may arise by prescription, but never in this country. The only exception to the rule that there can be no right of prescription unless there is a right of action is where a window remains on the border of property for twenty years, and the English rule that this gives a prescriptive right to light through that window is such a strong exception to the general rule that it is not allowed in America. In this country there is no right of action to prevent the window being walled up. The English doctrine on the subject of light has never found foothold in this country. It is an anomaly in the law. It cannot be applied in the growing cities and villages of this country without working the most mischievous consequences. It is one of those portions of the common law of England which are hostile to the spirit of our institu-

[66] Palmer v. Fletcher, 1 Lev. 122 (Eng.); Allen v. Taylor, 16 Ch. Div. 355 (Eng.); Keats v. Hugo, 115 Mass. 204; Fowler v. Wick, 74 N. J. Eq. 603, 70 Atl. 682.

[67] Barger v. Barringer, 151 N. C. 433, 66 S. E. 439 (N. C.); Wilson v. Irwin, 144 Ky. 311, 138 S. W. 373.

tions and not adapted to the existing state of things in this country, and, therefore, forms no part of our law.[68] Even in England in order to create a right by prescription there must be a substantial deprivation of light sufficient to render the occupation of a home uncomfortable and to prevent the plaintiff from carrying on his accustomed business on the premises as beneficially as he had formerly done.

461. **Right to air free from smell and noise.**—Every man has a right to have his land reasonably free from smoke, smell and noise. The courts, however, will only interfere with extreme cases, as, for example, where church bells are rung inordinately, the courts may enjoin such ringing if it is a matter of annoyance. Every landowner is bound to submit to a certain amount of inconvenience in the way of smell, smoke and noise emanating from his neighbor's property. But there are limits beyond which he may be protected by the courts. The maxim is applied to this, *sic uti suo quod alienum non laedat,* which is a Latin phrase meaning that each owner should use his own property in such a way as not to injure his neighbor's property.[69]

462. **Priorities in right to freedom from smell and noise.**—It is no answer to an action that the defendant was committing the nuisance complained of before the plaintiff bought his land, as one buying land buys it with all the rights the common law affords, one of which is a right to wholesome air.

[68] Parker v. Foote, 19 Wend. 309 (N. Y.).

[69] Collins v. Wayne Iron Works, 227 Pa. St. 326, 76 Atl. 24. Injunction granted against projecting a current of impure air against a building, Vaughan v. Bridgham, 193 Mass. 392, 79 N. E. 739.

Furthermore the fact that a business is necessary to the public is not a defense. The ancient doctrine was expressed as follows in Comyn's Digest: "So an action does not lie for a reasonable use of my right though it be to the annoyance of another, as if a butcher, brewer, etc., use his trade in a convenient place though it be to the annoyance of his neighbor." Supposing this to be the law there is some question as to the meaning of the words "convenient place," but it seems to be settled now in England that this language implies "inconvenient" in the sense that it inconveniences some individual.[70] It is suggested that the result of this doctrine might be to ruin a business of greater importance than the damage done to the complaining landowner. And it is possible that there might be cases where courts would not enjoin the use but would simply permit an assessment of damages.

463. **Acts proper in certain localities.**—It sometimes happens that a particular locality becomes so devoted to a kind of objectionable business that any man who takes land there must take it subject to the character of the locality. For example, if smelting factories have occupied a district for twenty years and then a house is built in the midst of them, you cannot enjoin the continuance of the factories, as the property has not been injured, since the factories were there first.[71] On the other hand, if a house was there first and the factories were built later the

[70] See Gose v. Coryell, 126 S. W. 1164 (Tex.), LEADING ILLUSTRATIVE CASES; "comfortable enjoyment" considered as applied to house adjacent to hospital. Everett v. Paschall, 111 Pac. 879 (Wash.).

[71] St. Helen's Smelting Co. v. Tipping, 11 H. L. C. 642 (Eng.).

owner of the house could enjoin the use of the factories. In other words, there is a difference between coming to a nuisance and a nuisance coming to you. Where the landowner is already settled in a locality, then it is not a matter of money but of comfort. On the other hand, where the factory is there first, then it is a matter for pecuniary consideration.

464. **No prescriptive right till injury done.**—A landowner in the city must submit to a certain amount of rumbling and noise from his neighbors which he might well be able to stop if in the country. There is a case, for example,[72] where the defendant had had for years a pestle for pounding candy in his store when the plaintiff built a consulting room on the party wall, and the court holds that the plaintiff can enjoin the use of the pestle, as there was no prescriptive right to use it until the plaintiff built his consulting room and created in himself a right to object. So a man cannot be said to assent or acquiesce in the acquisition by his neighbor of an easement through an enjoyment of which he has no knowledge actual or constructive.

465. **Actions to prevent prescription.**—There are cases where an action may be sustained, although no damages can be proved, where the action is brought simply to prevent the obtaining by the defendant of a prescriptive right to the nuisance, but a court of equity will not interfere to enjoin such a use unless distinct damage can be proved.[73]

466. **Percolating water.**—There is no right as

[72] Sturges v. Bridgman, 11 Ch. Div. 852 (Eng.).
[73] Vaughan v. Bridgham, 193 Mass. 392.

against a neighbor to what is commonly called percolating water. Suppose a man digs a coal pit and cuts off the water which supplies the well on his neighbor's land, there can be no right of action. On the other hand, no man has a right to deposit impurities in the ground which pollutes percolating water going to a neighbor.[74] The distinction between underground water and water on the surface is this, that the right enjoyed by the landowners in streams is public and notorious and uninterrupted. The rule, therefore, either presumes for its foundation the implied assent and agreement of the proprietors of different lands from all ages, or possibly it may be considered as a rule of positive law. But in the case of a well the water which feeds it from a neighboring soil does not flow openly in the sight of the neighboring proprietor, but through the hidden veins of the earth beneath its surface. No man can tell what changes these underground sources have undergone in the process of time, and also no proprietor knows what portion of water is taken from beneath his own soil, how much he gives originally or how much he transmits only, or how much he receives. On the contrary, until the well is sunk and the water collected by draining into it there cannot properly be said to be any flow of water at all. There is, therefore, no ground for implying any consent or agreement between the owners of the lands, nor can there be said to be any long continued acquiescence and submission while the very existence of the underground springs or of the well may be unknown to

[74] Bellview Cemetery Co. v. McEvers, 168 Ala. 535, 53 South. 272 (Ala.).

the proprietors of the soil. Furthermore, the consequences of allowing the right of action in case of percolating water would be disastrous, as it would give the man who builds a well in his own land an absolute right to the water that collects in it and give him the power to prevent his neighbor from making use of the spring in his own soil, which might interfere with the enjoyment of the well.[75]

467. **Same subject—Malice.**—Suppose A grants to B a right to draw water from a spring on A's land and then A sells part of his land, including the spring, to C. C thereupon digs a well drying up the spring of B, who then sues C. It seems that B has no right of action against C, although he might possibly recover from A.[76] The mere fact that the defendant's act in digging an artificial dam to stop percolating water from going on the plaintiff's land to supply his well is actuated by malice is insufficient foundation for liability, as the act done is legal in itself and cannot be made illegal on account of the motive behind it. There is, however, some authority the other way.

468. **Underground streams.**—On the other hand, if you can prove a real stream underground, as distinguished from mere drippings, you may have an action, even if you did not know of the running stream when you dug your well. But the presumption is that well water is only percolating water.

469. **Surface water.**—In general there are no rights in surface water. A man has a right to change

[75] Acton v. Blundell, 12 M. & W. 324 (Eng.).
[76] Davis v. Spaulding, 157 Mass. 431.

the surface of his land and arrest surface water or even turn it on the land of his neighbor, though the erection of a building or other structure to stop surface water may be held to be illegal. Furthermore, if changing the land makes the surface water a running stream, even then the owner is not liable.[77] Where a pond and swamp are mere surface collections, there can be no rights in them and a landowner can take all of the water from such a collection. On the contrary, if there is a stream which is dry in summer, this is still a running stream, as it has a channel, and when there is any water in it there will be the usual rights on the part of all the riparian owners.

The public is interested in the reclamation and improvement of waste lands but there is no reason why a perpetual easement should be imposed upon them for the drainage of surface water from high land. Therefore, an owner has a right to prevent surface water from running on his land.[78]

Where the surface water formerly ran off over land and the owner thereof raised his land, the court holds that the adjoining owner has an absolute property in the surface water and may appropriate its exclusive use or get rid of it. In England he can turn it off although by so doing he prevents the water from reaching a natural water course as it formerly did, provided only that he does not cast it by drains or ditches upon the land of his neighbor.

[77] Gannon v. Hargadon, 10 Allen 106 (Mass.); Perry v. Clark, 89 Neb. 812, 132 N. W. 388 (Neb.).

[78] Barkley v. Wilcox, 86 N. Y. 140.

470. **Same subject—Effect of artificial structure.**—While it is true that there can be no action against one who turns surface water upon the land of his neighbor, still he has no right to throw it on the neighbor's land through any kind of an artificial structure. So if a man has a house with the eaves so close to his neighbor's land that the water flows from the eaves on the neighboring land, the owner has a clear right of action, as the water is thrown there by an artificial structure. On the other hand, if one had a swamp which he filled up in such a way that the water therefrom went on to the adjoining land in rainy weather, there would be no right of action, as this would not constitute an artificial structure. For if you only change the surface of the land in some way there is no liability. But there is an English case where the defendant by leaving piles of refuse on his land caused water to ooze from it on the plaintiff's land, and this heap of refuse was held an artificial work entitling the plaintiff to recover.[79]

471. **Right to reasonable use of stream.**—In this country every man has a right to a fair and reasonable use of the water in a stream, even though there is actual damage done to another landowner. If this were not the rule then the only man who would have the right to use a stream would be the owner at the mouth of the stream, and he is usually not in a position to use it. The test of what is a fair and reasonable use is whether there remains a fair share of the water for the riparian land. So where the upper

[79] Hurdman v. Northeastern Railway Co., 3 C. P. D. 168 (Eng.).

owner raised his dam and cut off the water from the plaintiff's mill for six days, it was held that this was a fair and reasonable use which the defendant had a right to make, even although there was an undoubted damage to the plaintiff.[80] The question what is a reasonable use has to do with the current and general usage as well as other things, so it is properly held that the defendant cannot collect water in a pond an unreasonable time and let it out suddenly.[81]

472. **Test of reasonable use.**—The question of the reasonableness of the use of a stream when it is not settled by custom and is in its nature doubtful, should always be regarded as one of fact to be determined by the tribunal trying the facts. The measure of reasonable and prudent care in such cases is that which prudent and careful men exercise in the management of their own business. Proof that all prudent and careful men in the management of a business pursued a course and that others acquiesced in that course without objection would seem to be important for the jury. The owner of the land may change and control the natural flow of a stream provided it is reasonably done and he may by ditches or otherwise accelerate the flow or increase the volume of water which reaches the stream—if he does this in the reasonable use of his own premises he exercises only a legal right and incurs no liability to a lower proprietor. The only qualification is that one owner cannot by artificial arrangements concentrate and discharge into the stream surface waters

[80] Pitts v. Lancaster Mills, 13 Metc. 156 (Mass.).
[81] Chatfield v. Wilson, 28 Vt. 49.

in quantities beyond the natural capacity of the stream to the damage of other owners. So where a landowner allows water from a ditch to run into his quarry during the winter and pumps it out every spring, it was held that this was a lawful use of the water.[82] Where steam engines are supplied from a river the rule is that the railroad cannot take more than a fair share of the water, and cannot even take that for business off the land if it injures the man below. So if the water for an engine is used for a stationary engine, the use of it is proper, while not for a locomotive engine.

473. **Right to use stream for domestic or business purposes.**—All owners on a stream have a right to take water reasonably for domestic uses. Suppose the man up stream uses water for his cattle to such an extent that it dries up the stream, still the man below has no right of action. Suppose, on the other hand, there is a hotel up stream—that would seem to be more like a business, but would probably still be considered a domestic use. The use must be reasonably economical for domestic purposes. There is a distinction between the English rule and the American rule along these lines. There is no case in England allowing the man above to take for his business, as the streams are not large in England. But in this country, a man is entitled to his fair share of the water, even for business purposes. No limit has ever been set to the right to use water for domestic purposes. For example, a large farmer has a right to bring his cattle from all parts of his land.

[82] McCormick v. Horan, 81 N. Y. 86.

474. **Rights by prescription.**—Where a man takes water from a stream an owner below him has no right of action where there is neither actual nor constructive damage. Therefore no right by prescription to take such water can arise. There can be no prescriptive right to irrigate meadowland as against the upper proprietor, for the upper proprietor could never have a right of action to prevent it. The mere existence for a long while of the usage of irrigation gives the lower owner no right of action against an upper owner who detains the water.[83]

475. **Doctrine of prior appropriation.**—If a man builds a mill and stops the water materially and the man below afterwards wants to build a mill, the upper owner has no right by prior appropriation. He can hold a right to seriously interrupt the flow only by prescription or by grant. There is no such thing as first appropriation of water known at common law. In the western states, however, where water is scarce, the doctrine of prior appropriation has grown up, as it has been considered that the common law theories of a reasonable use of the water to everybody do not apply, and statutes have frequently been passed protecting appropriations of water to beneficial uses. For example, water may be appropriated for irrigation and for milling but not where the water was simply taken with no intention of using it beneficially.[84] It has recently been held, however, to be a beneficial use, to appropriate water in improving the banks of a stream and build-

[83] Sampson v. Hoddinott, 1 C. B. (N. S.) 590 (Eng.).

[84] See, for example, Hammond v. Rose, 11 Colo. 524; McDonald v. Bear River, etc., Co., 13 Cal. 220.

ing a hotel and summer resort, the chief attraction of which was the vegetation dependent on the water.[85]

476. **Right to pollute or make deposits in stream.**—A reasonable use of a stream includes not only a right to take water from the stream but includes the right to deposit foreign substances in the stream to a reasonable amount. So where tanneries are accustomed to deposit the tan bark in the stream, the fact that this was the custom in the state and necessary for a tannery is important.[86] So the deposit of sawdust to some extent is nearly indispensable to the running of saw mills and no complaint can be made against such deposits if made in the usual manner. A non-riparian proprietor has no right of action against a polluter who is not a riparian proprietor, as a right to water is non-assignable and non-grantable but pertains only to riparian land. This right reasonably to pollute a stream applies only to running streams and where, through want of repair, the water from a cesspool on one man's land oozes through to the land of another, there is liability, as every man must keep his own filth on his own land.

477. **Rights in ice.**—The question may be raised whether there is property in ice. Suppose a navigable river is frozen. As it is a right of way, a man may travel on both sides of it, but may cut ice only on his own side while ice is in position. As it freezes there will be property in it, but probably not when it begins to float in cakes.[87]

[85] Cascade Town Company v. Empire Water & Power Co., 181 Fed. 1011.
[86] Snow v. Parsons, 28 Vt. 459.
[87] Huntington v. Asher, 96 N. Y. 604, LEADING ILLUSTRATIVE CASES.

CHAPTER XLII.

LATERAL AND SUBJACENT SUPPORT.

478. **Right of adjacent support.**—The right of an owner to the support of the land adjoining is a natural right like the right in a flowing stream. Every owner of land is entitled as against his neighbor to have the earth stand in its natural condition, but this right of property is only in land in its natural condition and the damages in such an action are limited to the injury to the land itself and do not include any injury to buildings or improvements upon it. No one can by his own act enlarge the liability of his neighbor for an interference with this natural right. If a man is not content to enjoy his land in its natural condition but wishes to build upon or improve it, he must either make an agreement with his neighbor or dig his foundations so deep or take such other precaution as to insure the stability of his buildings or improvements whatever excavations the neighbor may afterwards make upon his own land in the exercise of his right.[88]

479. **When land itself is not damaged.**—Suppose a man digs a well on land close to a neighbor's land and then fills the well up again with loose soil in such a manner that if there were no building upon it the soil might have subsided somewhat but would have

[88] Gilmore v. Driscoll, 122 Mass. 199; Moellering v. Evans, 121 Ind. 195, 22 N. E. 989, LEADING ILLUSTRATIVE CASES.

caused no appreciable damage. In this case, making the well and filling it up again were in themselves both lawful acts and the fact the neighbor had a building on the soil and the subsidence caused some damage to the building did not give a right of action. The test is whether there is any appreciable damage to the land apart from the damage to the building, and where there is none it would seem that the damage to the building cannot be tacked on to create a right of action.[89]

480. **Prescriptive right to adjacent support—Abutters on highway.**—It is hard to see how the owner of a house can acquire by prescription a right to have it supported by the adjoining land inasmuch as he does nothing upon and has no use of that land which can be seen or known or interrupted or sued for by the owner thereof and therefore no assent of the latter can be presumed to the acquirement of any right in his land by the former.[90] There is no natural right to lateral support for buildings whose weight increases the lateral pressure, nor can an easement for such support be acquired in this country by prescription, and the grant of an easement of lateral support should not be implied between private landowners. There is, however, the well-established exception that easements of support are impliedly granted to an abutter on the street whenever the title to the street is separated from that to the abutting land.[91] So where a city built a tunnel below the

[89] Smith v. Thackerah, L. R. 1 C. P. 564 (Eng.).

[90] Gilmore v. Driscoll, 122 Mass. 199.

[91] In re Board of Rapid Transit Railroad Commissioners of New York, 197 N. Y. 81, 90 N. E. 456.

street, not for street purposes, thus causing the settling of the walls of the house of an abutter who did not own the fee in the street, the abutter may be entitled to damages for this loss.

481. **In case of intervening owner.**—Suppose there are three separate lots of land in a row side by side, numbered for convenience, 1, 2, and 3. Suppose the owner of No. 1 has mined his land and suppose owner No. 2 then mines his land in such a way that it causes no subsidence to the land of No. 1. Then subsequently the owner of No. 3 begins to dig and the result of removing support from No. 2 by digging on No. 3 is to cause damage to No. 1. In this situation there is no right of action by No. 1 against No. 3 because if the land of No. 2 had been left in its natural state the working on the land of No. 3 would have caused no injury. The neighboring landowner within the rule means the owner of that portion of land the existence of which in its natural state is necessary for support. Beyond that the landowner has no rights. It would be wrong to throw the responsibility on No. 3 for the act of an intervening party with no fault of No. 3. The act of the intervening owner, No. 2, was rightful as regards No. 1 and to prevent No. 3 from working his land amounts to a confiscation of the mines.

Support means support of land in its natural state by the neighboring landowner. The neighboring landowner means the owner of that portion of land, whether a wide or narrow strip, the existence of which in its natural state is necessary for the support of adjoining property. It has been suggested

that if the act of the intervening owner, No. 2, has been such as to take away the support to which the first landowner is entitled, then the first owner may have an action against him. But there is no reason why the third owner should bear the burden. If the intervening owner has destroyed the natural and legitimate support of the property of No. 1, the owner of the third piece of land has no right to complain of his act and hence is not liable for it.[92]

482. **When damage does not immediately follow excavation.**—Suppose the excavation by the defendant is done in October and the land is not immediately affected by it, but the winter's rains and frost cause it gradually to give way and in the following March it finally does give way and subsides. In such a case it is a fair inference that the digging was the immediate cause of the subsidence which followed through natural agencies, and the defendant is liable therefor.[93]

483. **Nature of right to subjacent support—Rule of damages.**—There is a right of subjacent support, though this is not by grant but is a right of property passing with the soil, as otherwise the surface cannot be enjoyed at all. It is like the upper and lower stories of a tenement. The law in England is that the cause of action in the cases of subsidence of the soil caused by the working of mines is not the withdrawal of support, but the subsidence itself. The proper measure of damages in such cases is the depreciation in the market value of the premises and

[92] Corporation of Birmingham v. Allen, L. R. 6 Ch. Div. 284 (Eng.).
[93] Gilmore v. Driscoll, 122 Mass. 199.

it has been recently held that a depreciation of the selling value due to the fear of further subsidence cannot be taken into account in estimating damages.[94] The liability for removing minerals, which removal causes a road on the adjoining land to sink, is not limited to the expense of building an equally good road at the lower level, but the defendants are liable for the reasonable cost of re-building the road to its former level.[95]

484. **Effect of existence of buildings.**—The English rule is that one can get damages for his house when it falls only where the land would have fallen whether or not there was a house on it. Where the land is injured and the subsidence of the land was not caused by the weight of the buildings, the existence of the buildings becomes unimportant in considering the question of liability. It is as if a mere model had stood there the weight of which bore so small a proportion to that of the soil as to add practically nothing to it. But when the question of damages is reached it is perfectly proper to consider the damage done to the house.[96]

485. **Liability does not depend on negligence.**—It is no defense that due care was used in digging, as the right of support is an absolute right. Where the surface of the land and the minerals belong to different owners, the owner of the surface, while it is unincumbered by buildings and in its natural state,

[94] West Leigh Colliery Co. v. Tunnicliffe & Hampson (1908) A. C. 27 (Eng.).

[95] Wednesbury Corporation v. Lodge Holes Colliery Co. (1907) 1 K. B. 78 (Eng.).

[96] Browne v. Robins, 4 Hem. & M. 186 (Eng.).

is entitled to have support by the subjacent mineral strata. These strata may, of course, be removed by the owner of them, so that a sufficient support of the surface is left. But if the surface subsides and is injured by the removal of these strata, although on the supposition that the surface and the minerals belong to the same owner, the operation may not have been conducted negligently or contrary to the custom of the country, the owner of the surface may still maintain an action against the owner of the minerals for the damage sustained by this subsidence. The reason for the rule is that unless the surface is entitled to this support it cannot be enjoyed as property at all, and under such circumstances it might be entirely destroyed where the mineral strata approach the surface and are of great thickness. This right of support must be enforced in all cases without reference to the nature of the strata or the difficulty of propping up the surface or the comparative value of the surface and the minerals. No qualifications can be made on the rule, as that there is only a right to a reasonable support for the surface. The rule is that the only reasonable support is that which will protect the surface from subsidence and keep it securely at its ancient and natural level.

486. **Right of support subordinate to rights in percolating waters.**—The right of support of an adjoining landowner is subordinated to one's right of intercepting percolating waters. For example, where a landowner while draining his land withdrew water from the subterranean soil under the plaintiff's adjoining land and this caused a consolidation

of the earth and a settlement of the surface to the damage of the plaintiff, it was held that the plaintiff could not recover. This rule is well settled in England, but there seems to be only one case on the subject in this country.[97]

487. **Liability for removing solids in solution—Quicksand.**—When what is drained off is not merely fluid but contains other things in solution, the question is more difficult. For example, where the pumping operations involve the withdrawal of quicksand from the land causing it to subside, this is a fair ground for damage.[98] In the case cited, defendant had no right to take away the soil, as he thus deprived plaintiff of lateral support. It is immaterial that the soil was removed by pumps from the trench. The American cases generally regard simply the fluidity of the substance withdrawn, as for example, the taking of natural gas[99] or petroleum[1] is not a ground for damage although it reduces the amount available to the neighbor. So in a recent English case, the owner of a salt mine was allowed to continue pumping brine although it contained in solution salt from the neighbor's land.[2]

Where quicksand is sucked out so that the subjacent and lateral support is lost and the land cracks, the better rule is that it is the duty of the defendant to prevent the loss of support. The defendant had no right to take away the soil of the plaintiff and it

[97] New York Con. Jewell Filtration Co. v. Jones, 37 D. C. App. 511.
[98] Cabot v. Kingman, 166 Mass. 403.
[99] Hague v. Wheeler, 157 Pa. St. 324.
[1] Kelley v. The Ohio Oil Co., 57 Ohio St. 317.
[2] Salt Union, Ltd. v. Brunner Mond & Co. (1906) 2 K. B. 822 (Eng.).

is immaterial that the soil was removed by means of pumps from a trench into which it had fallen by its own weight or had been carried by percolating water. It is hard to distinguish such a case from one where the soil falls in from the surface in consequence of an excavation on the adjoining land and the plaintiff has been deprived of the lateral support to his land; for the quicksand has run from under the surface of his land into the trench and has been removed by means of pumps which caused the surface to settle and crack. It was the duty of the defendant to prevent this in some manner.

Another view would seem to be that the better distinction is between the support of liquids and the support of solids; this view would put a subsidence caused by the removal of quicksand in the same class with a subsidence caused by the removal of percolating water.[3]

[3] Cabot v. Kingman, 166 Mass. 403, 44 N. E. 344.

CHAPTER XLIII.

EASEMENTS.

488. **Easement defined.**—An easement is a privilege without profit which one has for the benefit of his land in the land of another. And easement has also been defined in more ample terms to be "a privilege without profit, which the owner of one tenement has a right to enjoy in respect to that tenement in or over the tenement of another person, whereof the latter is obliged to suffer or refrain from doing something on his own tenement for the advantage of the former."[4] It is "a charge or burden on one estate for the benefit of another."[5]

489. **Kinds of easements.**—Easements are of two kinds. The first comprises those easements which limit natural rights; the second comprises other easements. The first includes the right to pollute the air with smoke; the right to withdraw support from land; to divert or pollute water, etc. The best example of the second class is the easement of fencing. A positive easement occurs when the dominant tenant has a right to do some act on a servient tenement. A negative easement occurs where the right is to call on the servient tenant to abstain from some act. For example, a right of way is a positive ease-

[4] Gale, Easements, p. 5.

[5] Morrison v. Marquardt, 24 Iowa 35; Goldman v. Beach Front Realty Co., 83 N. J. L. 97, 83 Atl. 777 (N. J.), LEADING ILLUSTRATIVE CASES.

ment, while a right to light and air is a negative easement. In another sense both of these easements are negative as they do not call on the servient tenant to do anything. The servient tenant is very seldom called upon for action, the only exception to that being in the case of fencing. Easements are not of any definite number or kind or variety.

490. **Easement in gross.**—It is settled that there can be no such thing strictly as an easement in gross, that is to say, an easement vested in one particular person entirely apart from the ownership of the land.[6] The reason is that the courts do not favor restrictions of this character on property. An easement in gross is not of very much value to the owner, but may be very burdensome to the land itself. The right of a person to walk over other property is more likely to be used for extortion to prevent building upon it, or other proper use of the land. This is the distinction between an easement and a profit, as a profit is for legitimate business and it may be immaterial where the owner lives. A mere naked right to pass and re-pass over the land of another is not in any proper sense an interest or estate in the land itself. Such a right is in its nature personal. It attaches itself to the person of him to whom it is granted and must die with that person. If such right be an inheritable estate, how will the heirs take? If it be assignable, what limit can be placed on the power of alienation? Where the way is appendant or appurtenant to other lands very different considerations arise. There the right attaches to the lands to which

[6] Rangeley v. Midland R. Co., L. R. 3 Ch. 306 (Eng.).

the way is appurtenant because it is granted as a convenience for their occupation without respect to the ownership or number of occupants. In such case, the right of way passes with the dominant estate as an incident. There are however some jurisdictions which sustain easements in gross and hold them descendible and assignable.[7]

491. **Presumption against easement in gross.**—The presumption is that a right of way is not in gross wherever it can be construed to be appurtenant to other land. A way in gross can never arise where land is granted with words of perpetuity as "to a man, his heirs and assigns" and it will also be presumed even in the absence of such words that the way was appurtenant where it was intended and for the benefit of land and is of no use for any other purpose. Where a way has neither end on the premises of the claimant of the way it may be considered to be in gross.

492. **Easements by custom in England.**—Easements formerly might be created in England by custom and it was then held that a custom when confined to a certain class in a community might be valid. A custom to be valid must be certain, must be reasonable in itself, must commence from time immemorial and must be continued without interruption. A custom is not reasonable merely because it is contrary to some rule of the common law as is the custom of gavelkind and borough English, nor is a custom unreasonable because it is prejudicial to the interest of an individual if it be for the benefit

[7] Bowen v. Conner, 6 Cush. 132 (Mass.).

of the state, as the custom in favor of husbandry or drying nets on the land of another. In an early case a custom was sustained to victuallers to have a fair on certain land every year. On the other hand, a custom that is contrary to the public good or injurious to the mass of the people and beneficial only to some particular person is unreasonable, for it could not have had a reasonable commencement. So a custom set up in a manor on the part of the lord that the commoner cannot turn in his cattle until the lord has put in his own is clearly bad, for it is injurious to the multitude and beneficial only to the lord.

493. **Easements by custom in this country.**—In this country there is no such thing as an easement by custom. It is said that "time of memory" has been ascertained in England to commence from the beginning of the reign of Richard I, and the result is that it cannot take place in this country as this country was not settled until more than three hundred years after that time. This country is growing faster than England and it would cause endless hardship and be a great impediment to growth to allow customs of various kinds to hamper landowners in the use of their lands.[8]

494. **Rights by prescription.**—In this country the law is that rights by prescription must be based on definite use for a prescriptive period hostile to the landowner.[9] An action may be brought for an unlawful act notwithstanding it causes no damage to

[8] Ackerman v. Shelp, 3 Halst. 125, 8 N. J. Law 125.
[9] Holm v. Davis, 125 Pac. 403 (Utah).

the plaintiff, as the plaintiff may be entitled to nominal damages if his right is infringed, to prevent the running of the Statute of Limitations.

495. **Requisites of right of way.**—A right of way may be granted by deed in the usual form but cannot be created by parol. A right of way is an interest in land of an incorporeal character. The essentials of an ordinary right of way appurtenant to land are that there must be two distinct tenements: the dominant tenement to which the right of passage belongs, and the servient tenement upon which the burden rests.

496. **Way by grant for what purpose.**—It may be laid down as a general principle that a grant of a right of way gives a right only for the exact use specified in the grant and for no other purposes. So a conveyancer should be careful in drafting a grant of a right of way to have inserted in it the expression "for all purposes" or some similar expression. Where a man has a right of way along a narrow passageway for carts and pigs, it is a question for the jury whether a right of way for cattle is to be presumed from the grant and the argument of inconvenience is a strong argument against it.

497. **Way by prescription for what purpose.**—The basis of a right of way by prescription is claiming as a matter of right. Good faith is not necessary, as it was in the old civil law. The question is what the squatter claims to the world to be. So it may be that using a way for some years for agricultural purposes will not give a right to use it for residential purposes, when a house is built upon the land.

The only right which can be obtained by prescription is a right of way for all purposes according to the ordinary and reasonable use to which that land might be applied at the time of the supposed grant. Where there were no buildings on the property at the time the way by prescription was obtained, the use of the property for buildings could not have been an ordinary and reasonable use at the time of the supposed grant.[10] A right of way by prescription for horses may arise if a man drives one horse for twenty years, and it cannot be said that that is a right of way for that particular horse. The law will generalize by saying that the right of way is granted for vehicles of the kind used during the prescriptive period. If a way is confined to a particular purpose this cannot be extended, but if it is proved to have been used for a variety of purposes, then the jury may be warranted in finding a way for all purposes.

498. **Way to what place.**—Where A has a right of way over B's land to his own land, A has no right, if he buys adjoining land, to use the right of way as a means of access to his new land. He can, of course, carry goods to his original lot and then he has a right to take them from time to time from that lot to his new land. But there is a question whether the stopping on his original parcel is done in good faith or not. It is what is called a question of an honest dump. To avoid this difficulty, conveyancers should always insert in a grant of a right of way the expression, "to this and all places beyond," or some similar language. So where A owned all the hay on three

[10] Wimbledon, etc., Conservators v. Dixon, 1 Ch. 362 (Eng.).

fields and stacked it on a nine acre lot which had a right of way by prescription over the land of B, and then sold the hay to C, who carted it over the land of B, the jury could well find an honest stacking of the hay and that there was a right of way for this particular hay.[11]

Where a landowner has enjoyed for twenty years a right of way to a highway and the highway is the terminus, he has a right to go to the highway and to every place beyond it. But if A has a right to cross B's land to land of D, which is on the opposite side of the highway from B's land, then A has no right to go anywhere on the highway. But, on the other hand, if the grant is of a right of way to the highway and from the highway to D's land, then that is good to go anywhere on the highway.

499. **Way by necessity.**—Where land is entirely surrounded by other land there may arise what is known as a way by necessity. The owner of the land outside may designate any reasonable line of way. If the owner of the land outside indicates an unreasonable line the insider may elect to take another. When the way is once given it is fixed and settled. No way of necessity can exist over the land of a stranger. In short, land over which a way by necessity is claimed must at some time have been united in possession with the land to which a way is claimed. A way by necessity cannot exist where there is other means of access to the land, either over the property of the owner who claims the way, or even where there is access to the land by water. The

[11] Williams v. James, L. R. 2 C. P. 577 (Eng.).

necessity must be created by the cutting up of tracts of land and not by act of the party who claims the right. A way by necessity means that the way is necessary to a reasonable enjoyment of the property and the fact that it is merely convenient is not enough.

A servient tenant has a right to designate a course for a way of necessity and if the parties cannot agree the way is to be determined not by the sole interest of either the owner of the way or the landowner, but by the mutual convenience of both parties.[12] A way of necessity is over the property of the last owner to be granted land by the inside landowner. The last taker is the neck of the bottle.

500. **Repairs or grade of way.**—The general rule as to repair of the right of way is that the owner of the right is bound to repair. He who has a right of way over the land of another ought to repair it unless the owner of the land binds himself to keep the way in repair. At common law, where a public way became impassable or what was called "founderous," a traveler had a right to leave the way and pass over adjoining land. But this rule did not apply to a private way. A way may be raised or lowered a little by the servient tenant, although it cannot be altered to make it inconvenient, as by building steps in it.

501. **Gate, bridge or buildings on way.**—Where there is a grant of a right of way over land, this is a general right of way and includes everything above and under it, even to all houses which may be built

[12] San Joaquin Valley Bank v. Dodge, 125 Cal. 77.

on it. The owner of the right of way may have a right to make a gravel walk on it and to build a bridge on the servient tenement.[13] Where a right of way is used for certain purposes, the owner of the land has a right to build over it unless by so doing he would render it unfit for use. Therefore, if a way has been used for carts a building can be built over it high enough so as to leave passageway for such vehicles. The ordinary rule is that a person having a right of way is bound to submit to a gate being put in the way, provided the gate is one that can be easily opened. Otherwise, the landowner will be obliged to fence the whole way. Bars in a rail fence that can be readily let down are a proper and reasonable obstruction.[14]

502. **Right to drain.**—Where a man gets a right to carry an artificial drain over the land of another, he should be careful to obtain the right for his land generally, and not limit it to any building, as a house or stable on the land. He must be careful not to limit the purpose at all or the easement by describing it in a special manner. The word "land" does not mean "at that time," while the word "house" does. A right to construct and carry a drain over the land of another from one's house to the other's cesspool gives only a right to a reasonable use of the drain from the house in the condition in which it was when the grant was made, and therefore when the house is increased in size the other owner has a right to stop the drain.[15]

[13] Newcomen v. Coulson, 5 Ch. Div. 133 (Eng.).
[14] Bakeman v. Talbot, 31 N. Y. 366.
[15] Wood v. Saunders, L. R. 10 Ch. 582 (Eng.).

503. **Right to pond water.**—Where water is thrown on the land of the defendant by the wrongful act of the plaintiff, the defendant has a right to make a ditch on his own land and thereby draw off the water flowing upon it.[16] Owners often acquire, however, the right to pond water on the land of another. The right to pond water on the land of another is an incorporeal hereditament—a right not to the land itself, but to a privilege on and upon the land, impairing to that extent the dominion of the proprietor therein. Set up as a permanent interest granted to the lower landowner and transferable by him, the right is inoperative unless granted by deed, because it is a freehold interest, and cannot pass but by deed. Regarded as a mere license between the parties, it is difficult to see how it can be binding; therefore, when oral it will be construed as a mere revocable license, which will cease at any rate with the life of the grantor. To hold that such a permission thus given should operate forever for the benefit of the grantee and his assigns against the grantor and his heirs would be in effect to permit a fee simple estate to pass under the name of an irrevocable license. Purchasers would never know what incumbrances were upon their lands, and instead of the solemn and deliberate instruments which the law requires as the indispensable means of transferring freeholds, valuable landed interests would be made to depend wholly on the integrity, capacity, or recollection of witnesses.[17]

[16] Morse v. Copeland, 2 Gray 302 (Mass.).
[17] Foote v. New Haven & Northampton Ry., 31 Conn. 214.

504. **Mill Acts.**—The Mill Acts created easements, as there is a natural right not to have water dammed back on the land. The Mill Acts are a series of statutes by which a landowner may build a dam and set water back by paying damages due to the flooding. They have been held unconstitutional in some states, but are usually supported on the ground that they are a statutory arrangement for the partition of water.[18]

505. **Right to let eaves drip on land of another.**—Where an owner has a right to let his eaves drip on his neighbor's land and he tears down the old buildings and rebuilds them with new eaves about two feet higher than the old, it may very properly be held that this is not a new or additional burden on the land. The question in such cases is, whether the burden is increased, or whether it is substantially the same. And if the burden is not increased then there is no right of action.

506. **Pews.**—Pews in England were often held by the owners in fee simple, as the owner was conceived to own the land under the pew and the pew then was real estate. On the other hand, in this country, a right in a pew may be a mere right to sit there during religious services. In parts of New England pews were formerly real estate, but are now by statute made personal property in the nature of an easement.

507. **Rights in cemeteries.**—In some independent incorporated cemeteries the owners hold their lots in fee simple, while in others there is a mere right

[18] Head v. Amoskeag Manufacturing Co., 113 U. S. 9.

to be buried there. In case of a churchyard cemetery the right of burial is usually an easement and not a title in fee.

508. **Abandonment of easement.**—An easement may be abandoned at any time and it makes no difference what kind of an easement it is. Abandonment is good when acted upon, although there is some authority to the effect that it is not necessary that an abandonment be acted upon. Suppose, for example, that the owner of a right to windows or light builds a blank wall where the windows formerly were and then opens them up again before his neighbor shuts up the openings on his side of the division line, the easement for light and air should still stand. So if a wall is taken down for the purpose of rebuilding, the easement is not lost, but is merely suspended.[19] Where a new city street is platted diagonally across an ancient right of way and the owners, when the street is constructed, move their occupation up to the line of the new city street, the way, as originally established, has practically ceased to exist and the landowner by taking possession of a portion of the old way has unmistakably signified his consent to its destruction. The way was intended to exist as a whole and the party, by taking possession of part of it, has destroyed it.

509. **Abandonment of way.**—A non-user of a right of way for twenty years is evidence of an intention to abandon it. A right of way can be destroyed in two ways besides by direct release: First, by voluntary abandonment; second, by adverse use. If at

[19] Moore v. Rawson, 3 B. & C. 332 (Eng.).

any time the owner of the way have another right of way and give up the one in question with the intention to abandon it, if that is proved, his right will cease at once. On the other hand, if he did not intend to abandon it, a non-user for twenty years is evidence of an intention to abandon, though the case is open to explanation and may be controlled by evidence that the owner had no such intention while omitting to use the way.[20] Where a right of way had not been used for over forty years, it is said that mere non-use will not be enough as a basis for evidence of abandonment. There must be other circumstances in the case to raise that presumption. The non-user, therefore, must be the consequence of something which is adverse to the user and the only inference that could be drawn from the non-user is that the owner of the right of way had no occasion to use it. On the other hand, if the servient tenant makes the way impassable for twenty years, then the right is gone.

510. **Merger.**—It is a general principle that an easement is extinguished whenever the dominant and servient tenements become united in one person. This obviously does not take place unless the whole estate of each is acquired. So, if one owner has only an estate for years, the easement is merely suspended during the existence of the estate for years. In the same way, where one person occupies the dominant and servient tenements by different titles and one title is defective and the other is valid, no merger will result. So in case of a natural watercourse,

[20] Pratt v. Sweetser, 68 Me. 344.

which does not arise by grant or prescription but by natural right, a merger of interests has no effect on the right.[21] Apparent, continuous easements which remain undisturbed during the unity of title will revive on severance of the estates.[22]

[21] James v. Plant, 4 Ad. & E. 749 (Eng.).
[22] Kieffer v. Imhoff, 26 Pa. St. 438.

CHAPTER XLIV.

LICENSES.

511. **Licenses distinguished from easements.**—An easement is an estate or interest in land, while a license is a mere personal privilege given to do something on the land of another. An easement must be created by deed, while a license may be created by parol. For ordinary purposes it may be said roughly that if a right in the land of another is created by deed, it is generally an easement, while if it is created by parol, that is, orally or by writing, unsealed, it is a license.[23]

512. **Forms of licenses.**—An easement may be modified or extinguished by parol license, as where water is thrown on a defendant's land by the wrongful act of the plaintiff. A license to cut a ditch through land and thereby draw off a part of the water from a pond is revocable and the act of the defendant in stopping the ditch is justifiable. A parol license by a lower proprietor of water to the upper owner to take more than his share of the water may operate as a relinquishment of the natural right of the former. This is not a case of giving up an easement. It is not a case of the destruction of an easement, but rests on the general principle of the right to give up a natural right, and the natural right

[23] Wood v. Leadbitter, 13 M. & W. 838 (Eng.), LEADING ILLUSTRATIVE CASES.

to have the water run imposes something in the nature of an easement on land up stream so that it can be revoked by parol.

513. **Implied license to purchaser of chattel to get it.**—A license may be created where one makes a purchase and the seller gives him a license to go on his land and get the thing sold, as where A purchased hay on condition that B should let him go on B's land and get it. This was said to create a license acted upon by the buyer and was therefore irrevocable. So if a farmer sells a cow, the mere selling of the cow gives the buyer an irrevocable license to go on the property of the seller and get the cow, even though nothing is said about any such right. So if a dog is sold or a bookcase or anything in the house, it makes no difference what, the buyer still has a license to enter, provided he uses no violence, to take the articles that he has bought.

514. **Revocation of licenses—Distinction between licenses creating and extinguishing easements.**—If one landowner gives another a right to cross his land and it is done orally, this creates what is known as a license, for an easement cannot be created orally, but must be granted by solemn deed. A license of such a character can be recalled by the landowner at any time. On the other hand, in equity, if a license is given and the licensee has spent money on his own land acting on the faith of it, it is unreasonable that that license should be recalled after the other party has acted upon it. So in general, it may be said that a license to do something on the land of the licensee when acted upon is irrevocable. In such

case the licensee claims no right or easement upon the licensor's land. This is not a case of a grant of an easement to be exercised upon the grantor's land, but a permission to the grantee to use his own land in a way in which but for an easement of the licensor such licensee would have had no clear right to use it.[24]

515. **Same subject.**—It is settled that a license to go on the licensor's land is always revocable and it must be under seal and in writing to render it irrevocable; otherwise the fact that consideration is paid for such a license is immaterial and it may still be revoked at the will of the licensor.

The rule sometimes laid down that a license executed cannot be countermanded is not applicable to licenses which, if given by deed, would create an easement; but to licenses which, if given by deed, would extinguish or modify an easement. It is also shown that the distinction, sometimes taken between a license to do acts on the licensee's own land, and a license to do acts on the licensor's land, is the same distinction that is made between licenses which, if held valid, would create, and licenses which extinguish or modify, an easement. Generally, if not always, a license which when executed extinguishes or modifies an easement, is, from the nature of the case, a license to do acts on the servient tenement,—the tenement of the licensee.

[24] Hewlins v. Shippam, 5 B. & C. 221, 223 (Eng.); Johnson v. Bartron, 23 N. D. 629, 137 N. W. 1092, LEADING ILLUSTRATIVE CASES.

CHAPTER XLV.

PROFITS.

516. **Profits distinguished from easements.**—There are two kinds of rights over the land of another. A profit is a right to take; an easement is a right to use. The law of profits has not been developed to any extent in this country, although the law of easements has become well developed.

Profits à prendre differ from easements, in that the former are rights of profit, and the latter are mere rights of convenience in land without profit. Thus rights of pasture, digging sand, and the like are profits, while a right to light would be an easement.

517. **Common appendant.**—A common appendant cannot exist in this country and formerly arose in England as a right of manor. This common appendant begins time before memory and means that a man shall have sufficient common for beasts which manure his land to which the right is appendant. Common appendant cannot be made at this time and cannot be alienated or severed from the other land to which it is appurtenant.

518. **Rights appurtenant.**—In order to make a right appurtenant it must be for the benefit of the dominant estate. So a right to take wood, to carry away trees, is clearly not appurtenant, as it is unconnected with the land of the servient estate. On

the other hand, if a man had a spool factory on lot A and a right to take wood from another lot B for the factory, and he sells A with all rights and appurtenances, there is a right appurtenant to lot A to take wood from B, which right passes to the buyer. A right to be appurtenant must have a natural connection with the estate. So where a man buys a lot with a coalshed he has bought a right to store coal as well as the lot. This right is appurtenant and passes to the grantee. If parties have an icehouse, this is an uncertain question. The icehouse is necessary for the business of taking ice. It is more than a mere storehouse, it is a machine to preserve it, and the right to cut ice is in all probability appurtenant to the land, although the question has never yet been definitely settled by the courts.

519. **Common of pasture.**—The common of pasture is the chief profit in England, but is not usual in this country. Here farmers hire land instead. There were at common law four kinds of common of pasture. In the first place common appendant which was of common right for beasts commonable, that is, those that are useful for plowing like horses and oxen, or sheep and cattle for manuring the land. Common appendant cannot exist today, as has been shown above. The second kind of common is common appurtenant for beasts not commonable, like swine, goats and the like. The third class is common pur cause de vicinage. This is not a real right, as the owner of the common can fence it in and keep out the beasts, but it is only an excuse for an action of trespass. The fourth kind of common is common in

)ss, so called because it pertains to no land and ıst be by deed or prescription.[25]

520. **Other commons.**—There are various other nmons besides common of pasture, as common of ;overs, which is a right to take crops of various ıds; common of turbary, which is a right to dig f; common of piscary, which is a right to fish, and mmon in the soil, which is a right to dig for coal d minerals and the like.[26]

521. **Creation by custom.**—An easement may se by custom, but a profit cannot. A custom is a ht arising because the owner is in a certain busi- ss or in a certain place. The owner of a prescrip- e right may release it, but the owner of a custom s no such power of release to the owner. A claim a right in the soil to dig minerals cannot be gained prescription.

522. **Profit by prescription.**—Where a right was imed by prescription on the basis of immemorial er by freeholders along a navigable but non-tidal er and where the right claimed was the right to ke fish without stint and for commercial purposes, was held that the right could not be so acquired, it was not necessary to the enjoyment of the minant estates. Nor was it reasonable, for the ates could be divided indefinitely and thus ex- ust the servient estate. So there were no reason- le grounds for presuming the grant. It had pre-)usly been held in general that a profit à prendre imed appurtenant to an estate must be reasonably

[25] Co. Lit. 122a.

[26] Hall v. Lawrence, 2 R. I. 218, LEADING ILLUSTRATIVE CASES.

limited to the needs of the estate in which such right was claimed to exist.[27]

523. **Prescriptive right to fish in private waters.**—The right of fishing in another's waters is a profit à prendre, a right to take a part of the produce of the land as distinguished from an easement which is a right without profit. A profit à prendre is incapable of creation except by a grant or prescription. In the case of the public there is no dominant estate to which a right by prescription could be attached, nor can a grant be presumed, for the unorganized public is incapable of taking by grant. Thus the right if claimed must rest solely upon custom and although custom will support an easement it has from early times been held incapable of supporting a profit à prendre.[28]

524. **Effect of transfers of land.**—Interesting questions often arise on sale of land to which profits are attached. It is settled that a profit in gross may be assigned but may not be divided. This is because a division of the dominant estate would increase the burden on the servient estate. However, where the profit can be measured in extent, as it is for the cows pastured on a certain lot of land, then that lot can be divided and the various owners of the lot will share proportionately in their rights to the servient tenement.[29] So if the servient estate is sold to a third party, the burden of the profit remains on all the land though divided between the two owners.

[27] Harris v. Chesterfield (1911) A. C. 623 (Eng.).
[28] Johnston v. O'Neil (1911) A. C. 552 (Eng.).
[29] Hall v. Lawrence, 2 R. I. 218.

Suppose A has a profit in B's land and B sells to C and D, A would still have a profit in all the land. On the other hand, where the dominant and servient tenements become united in part the whole common becomes extinct. For example, if A is the dominant tenant and there are two servient tenants, B and C, and B buys A's interest, the natural consequence of this would be that C would naturally turn all his cattle on B's portion of the land. The question in such cases is whether this right exists. It is immaterial how the two interests come together. It makes no difference whether the dominant tenant buys or sells. On account of the transaction the whole common becomes extinct.

CHAPTER XLVI.

PARTY WALLS.

525. **Ownership.**—In this country the landowners always know the exact boundary through our registry system. But in England there is a curious presumption that the land under a party wall is held in common. In this country the wall belongs to one or the other, according as it stands on one side or the other of the line. The ownership of the wall is determined by a line run up straight through the wall from the boundary. The fundamental theory as to party walls is that whatever you build on your neighbor's land is a gift to him. Any agreement made as to another's use of the wall and paying for it in common covers only the wall as to which the agreement was made. When the old wall is destroyed the agreement is ended. And if one landowner builds up a new wall on the premises and the other uses it he cannot be obliged to pay his proportion for the expense of the wall.

526. **Rights to use.**—When a man finds a party wall on his premises and he wants to build he has a right to tear it down so far as it stands on his own property or to insist on the neighboring landowner moving it off. Or as it is an erection on the land put there without his request he is at liberty to use it as his own.[80] The fact that two owners of adjoining

[80] Sherred v. Cisco, 6 N. Y. Super. Ct. 480 (N. Y.).

city lots united in the building of two buildings with a party wall between them gives no right to infer from that act an agreement binding upon them and their heirs and assigns to the end of time to erect another like party wall at their mutual expense when that one is casually destroyed, and so on as often as a new one shares the same fate. It seems to be the general doctrine that where a landowner builds a party wall, half on the land of his neighbor and half on his own, without any agreement for compensation or to divide the expense and then the neighboring owner uses the wall in his building, the latter cannot be forced to pay any portion of the expense of the wall unless there was some estoppel or reasonable expectation that the neighbor by contract undertook to assume his share of the expense when he used the wall.[31] In a recent Kentucky case, however, a recovery on these facts has been allowed.[32]

527. **Alterations in party walls.**—A party wall should fairly be treated as a structure for the common benefit and convenience of both the tenements which it separates and it is fair to presume that either party may make any use of it which he may require either by deepening the foundation or increasing the height, so far as it can be done without injury to the other. The party making the change when it is not required for the purpose of repair, is absolutely responsible for any damage which the change occasions, but insofar as he can use the wall in the improvement of his own property without

[31] Preiss v. Parker, 67 Ala. 500.

[32] Spaulding v. Grundy, 31 Ky. Law R. 951. 104 S. W. 293.

injury to the wall of the adjoining property there is no good reason why he should not be permitted to do so. Where a party wall is raised by one of the owners it cannot be taken down after being used by him, even if it was not used by the other party. There is no right apart from statute to extend a party wall sideways, as this can be done only by agreement. Either owner may, however, increase the thickness of a wall by adding to that portion of it on his own property.

CHAPTER XLVII.

RENT.

528. **Definition.**—Rent is the compensation paid by a tenant to his landlord for the occupation of property and is usually in the form of a fixed compensation or return reserved by a lease to be made periodically payable in money, produce, other chattels or labor for the possession and use of land and buildings.[33] On the other hand, there may be a case where A keeps land and grants the rent. This is what is known as a ground rent and is common in England, but not in this country, except in Pennsylvania.

529. **Kinds of rent.**—If a new system of law was to be built up, rent would not be treated as a question of property, as it is really a contract, or payment for the use of land. The rent is reserved when A conveys an interest in land to B and B promises to pay rent to A. This is the commonest form of rent reserved. Rent reserved was often called rent service, as at common law certain feudal services were incident to it, and occurred wherever a grant was made, the grantor reserving the rent. So where A grants to B and his heirs with the rent reserved; that is rent service. And if a deed is made by A in fee to B in fee—that was rent service before the

[33] Lake Erie, etc., R. Co. v. Griffin, 25 Ind. App. 138, 57 N. E. 722; Littleton, § 551, LEADING ILLUSTRATIVE CASES.

Statute Quia Emptores; but since the statute, a grant by A in fee to B in fee with rent reserved creates a rent seck.

In the case of rent service the parties could distrain. In the case of rent seck, they could not distrain, but could only have an action. But if there is a rent seck with the clause that the owner may distrain, that is a rent charge. The Statute of Anne provided that all rent could be distrained for and this made all rents a rent charge.

Actions for rent are always troublesome. Eviction is the most common way of handling poor tenants; but when they are turned out they need not pay further rent. If the tenant is turned out by a third person he is obliged to pay for the portion of the tenancy for which he was evicted, while if the landlord evicts him then he is not liable to pay for any portion of the tenancy.

530. **Attornment.**—As no vassal could transfer his feud without consent of the lord, on the other hand the lord could not sell his seigniory or estate without the consent of his vassal, which consent was called an attornment. The attornment was originally performed in the presence of all the tenants and signified the turning over from a former lord to a new one. Under the old law where a lease was made to a tenant for years and the owner sold to a third party, it was thought that a privity of estate must be created and that the privity of contract necessary to create the estate with the new owner could only arise by agreement between them, and that therefore agreement and attornment by the tenant were

necessary to make him liable for the rent. The necessity for attornment, however, was done away with by a statute passed in the reign of Queen Anne. An attornment in this country is now unnecessary, as it has been held unsuited to our conditions and was not transplanted to this country with the rest of the common law.[34] There is, however, an early dictum in Illinois to the effect that attornment is still necessary in this country.[35]

531. **Distress.**—The main incident of rent at common law was that it carried with it the right of distress. Distress was the forcible taking by the landlord of the tenant's goods to satisfy rent due and unpaid. This might be done without a writ or other legal process and worked such hardship that it is generally not authorized in this country today.

[34] Perrin v. Lepper, 34 Mich. 292.
[35] Fisher v. Deering, 60 Ill. 114.

CHAPTER XLVIII.

COVENANTS RUNNING WITH LAND.

532. **In general.**—There are certain obligations or agreements of landowners so connected with or appurtenant to the real estate and its use that they bind not only the owner who made the agreement but also his successor in the title. The successor in title may have the benefit of an agreement made for the benefit of land, as likewise he may be bound by the burden of an agreement which is a burden on land. In either event the agreement is called a covenant running with the land. In order to render a covenant one running with the land it must affect the real estate itself and must so relate to the land as to affect its value and enjoyment.

533. **Only covenants under seal run.**—At common law a covenant or agreement could not be assigned to give the assignee any rights in it, but by statute passed in the time of Henry VIII[86] covenants in deeds were in effect rendered assignable. The statute included estates for life and for years and not estates tail. The old law was that only covenants under seal would run with the land. Where an absolute lease in writing not under seal for a fixed term of years has been granted and the landowner has assigned his reversion, the assignee can maintain an action for use and occupation. However, a contract to

[86] 32 Hen. VIII, c. 34.

repair in that same instrument is not assignable by the landlord under the Statute of Henry VIII and except in jurisdictions where there have been statutes recently enacted the landlord can maintain no action on such a covenant.[37] So a parol agreement for the removal of a fence on the line of a railroad will not bind one who purchases from the covenantor.[38]

534. **Relating to things not in existence.**—If a covenant as to the use of land relates to a thing in existence at the date of the covenant, the heirs or assigns of the covenantor are bound by it, though the covenant does not expressly bind them; but where the covenant relates to something to be created in the future, the covenant must expressly bind the covenantor, "his heirs and assigns."[39]

535. **Whether heir is bound.**—At common law the heir is not bound by the covenant of his ancestor unless it be stipulated by the terms of the covenant that it shall be performed by the heir, and unless assets descend to him from his ancestor sufficient to answer the charge. If, therefore, the heir is not named in the covenant, it will be binding only on the covenantor, his executors and administrators, although the heir may take by descent from the covenantor assets sufficient to answer the claim. But this principle is not to be applied to real covenants running with the land granted or demised to which the covenants are attached for the purpose

[37] Standen v. Chrismas, 10 Q. B. 135 (Eng.).

[38] Wilder v. Maine Central R. Co., 65 Me. 332.

[39] Spencer's Case, 5 Coke 16a (Eng.); Woodruff v. Trenton Water Power Co., 10 N. J. Eq. 489.

of securing to the one party the full benefit of the grant or demise and to the other party the consideration on which the grant or demise was made. Such covenants are said to be inherent in the land and will bind the heir or assignee although not named. As he is entitled to all the advantages arising from the grant or demise, it is only reasonable that he should sustain all such burdens as are annexed to the land.

536. **When covenant runs.**—When A covenants for his heirs and assigns that B, his heirs and assigns, shall have a way over Whiteacre, the burden there runs with the land as well as the benefit, as B has an easement. An easement may be granted in the words of a covenant and is a right in rem. If, however, A for his heirs and assigns grants to B Blackacre and a right of way from Blackacre over Whiteacre, which he retains, and covenants to keep the way in repair, here the benefit of the covenant would run with the land, but the burden of repairing would not run in England. On the other hand, in this country, a covenant in aid of an easement or profit will run with the land.[40] If A grants a way to B and covenants to repair the way, the benefit of the covenant alone would run in England, while in this country the burden of the covenant would also run with the land. Suppose A grants to B and covenants to repair buildings, in that case the benefit would run with the land and the burden would not run. If, on the other hand, A covenants to repair B's buildings, and there is no grant of land made, the benefit might run, but

[40] Morse v. Aldrich, 19 Pick. 449 (Mass.).

the burden of the covenant would not run. This seems to be a case that has never arisen. If A grants land to B and covenants to pay B a sum of money, neither the benefit nor the burden of the covenant would run, as it does not touch the land. Suppose there is a covenant to pay money alone, that, of course, would not run, as it is not a covenant affecting land.[41]

537. **Privity.**—To create a covenant which will run with the land, it is necessary that there shall be a privity of estate between the covenantor and the covenantee. Privity may exist between the lessor and lessee, or between the grantor and grantee, and also where a grant is made of any subordinate interest in the land, the reversion or residue of the estate being reserved by the grantor. All covenants in support of the grant are real covenants and will bind the assignee. The words "privy" and "privity" are often used in connection with easements and covenants and mean standing in some relation to another, so an ancestor and an heir are privies, as are joint tenants and tenants in common. The executor is in privity with the testator. Privity really means little, as privies are those who are bound and those who are bound are privies. There is no special meaning in the expression, and it should be avoided wherever possible, although it is commonly used in the cases and text books.

538. **When courts will not enforce covenant.**—There is a recent case where the plaintiff bought

[41] Supplee v. Cohen, 80 N. J. Eq. 83, 83 Atl. 373, LEADING ILLUSTRATIVE CASES.

from the defendant land by deed containing a covenant not to use the land for any but church purposes. The covenant had not caused the land to be sold at a lower price and was of no value to the defendant, who was using it as a means of extortion. The court holds that the covenant is unenforcible and that the defendant must release it. The case is a good example of the modern tendency towards a broad, equitable use of the powers of the courts.[42]

539. **Equitable easement.**—An equitable easement is where the person bound is bound only if he knows of the easement and is not bound if he does not know of it. It depends on notice and on the principle that a person who takes land with notice of a trust in favor of other lands is bound by it. The registry system in this country is of itself notice of all things in it. So the English distinction of equitable easements is not important in this country, for if the easement is a matter of record the buyer is bound by it; if it is not a matter of record he is not bound by it. A good example of an equitable easement is where A sells land to B, who covenants not to build upon it, and then B sells to C with knowledge and A has C enjoined from building on the land. The court holds that the covenant does not run with the land, but equity will enforce it.[43]

540. **Same subject.**—Where A conveys land to B on condition that B shall not use it except for small houses and B proposes to put up factories, A may

[42] St. Stephen's Church v. Church of the Transfiguration, 130 N. Y. App. Div. 166, 114 N. Y. Suppl. 623. See § 163.

[43] Tulk v. Moxhay, 2 Phil. 774 (Eng.).

enjoin him. This is an equitable easement which consists in a burden on the lot of B for the benefit of the land of A. On the other hand, if A makes a covenant to do something on A's land for the benefit of B's land, that does not bind A's assignees. The only exception to this is the covenant for fencing and covenants in aid of easements. A covenant, whether affirmative or negative, cannot be enforced by a subsequent purchaser from the covenantee unless either the benefit is such as to run with the land of the covenantee, or the covenantee has manifested an intention of transferring to the purchaser or obtaining for his benefit the covenant in question. Such an intention is a question of evidence and where the whole property has been laid out as a building estate under a general scheme, the common seller may almost always be held to be a trustee of the covenants for the benefit of the estate as a whole and its several parts.

PART V

ACQUISITION OR TRANSFER OF TITLE

A. DURING LIFE WITH CONSENT OF OWNER

CHAPTER XLIX.

FORMS OF CONVEYANCES.

541. **In general.**—There are five methods of conveying real property at common law: First, by livery of seisin; second, by deed; third, by parol, or by parol and entry; fourth, by record; fifth, by special custom. The ancient form of conveyancing, or transferring title, consisted of a feoffment with livery of seisin. Livery of seisin has passed away, as has been already shown,[44] and a feoffment with livery of seisin has long since ceased to be generally employed, and the present method of bargain and sale derives its origin from the Statute of Uses.

542. **Feoffment.**—The earliest mode of transferring real estate known in the English common law was by livery of seisin only. But when the art of writing became common among our rude ancestors, a deed or feoffment was introduced in order to fix with more precision the nature and extent of the estate granted with the various conditions and lim-

[44] See § 57.

itations. This deed, however, was of no validity unless accompanied by the old ceremony of livery of seisin, which has been already described.[45]

543. **Ancient form of deeds.**—The word "give" was the proper technical term to be used in a feoffment. Its use arose at the time when gifts from feudal lords to their tenants were the conveyances principally employed.

The formal delivery of the seisin or feoffment which always took place in England rendered it a conveyance of great importance. Down to the time of King Henry VIII, nothing more was required for a valid feoffment than a proper livery of seisin, as has been already suggested. The Statute of Uses, however, added to the feoffment the requirement of a statement of a consideration for the gift, or that it should be stated to be made not simply "unto" but "unto and to the use of" the feoffee. If proper words of gift were used in a feoffment and witnesses were present who could afterwards prove them, it was immaterial formerly whether they were put in writing, though writing was generally employed. In those days, however, very few people could write, and therefore, when a written document was required, instead of signing their names, they would affix their seals, and the writing thus sealed was delivered to the grantee.

544. **Conveyance by special custom.**—Conveyances by special custom seem to have been confined to copyhold estates, and were ancient forms by which the tenant surrendered the tenements into the hands

[45] See § 54.

of the lord to the use of the grantee. And when this was done the lord was said to have "admitted" the new tenant, and that the old tenant had "surrendered" the tenement to the lord. The Statute De Donis did not apply to copyholds and therefore a copyhold might be entailed by virtue of a special custom, but where there was no custom to entail, a grant of copyhold land to A and the heirs of his body would give him a fee simple conditional. An entail of a copyhold could be barred by a surrender if it could not be barred by custom in any other way.

545. **Deeds poll and indentures.**—All deeds are properly divided into two classes, deeds poll and indentures, a deed poll being made by one party only, and an indenture being signed by two or more parties.

In the old days it was usual, where a deed was made between two parties, to write two copies upon the same piece of parchment, with some word or letters of the alphabet written between them, through which the parchment was cut in an indented line, so as to leave half the word on one part and half on the other to prevent any chance of substitution or fraud. Until recently every deed to which there was more than one party, was cut with an indented or waving line at the top and was called an indenture for that reason. On the other hand, a deed made by only one party was shaved at the top or polled, and was therefore called a deed poll.

546. **Fines and recoveries.**—Conveyances of record were at one time made by fines and recoveries, which were collusive actions, as the result of which

the title was ordered by the court to pass from the grantor eventually into the hands of the grantee. These were commonly used to bar an estate tail, and to pass a married woman's interest. Under the Statute De Donis[46] an estate tail could not be barred by a fine, but in Taltarum's Case immediately after its enactment a common recovery was held sufficient to effect this result. A fine or recovery by a tenant for life in possession worked a forfeiture of his estate and destroyed contingent remainders, but did not destroy vested remainders dependent upon the life estate.

547. **Deed of bargain and sale.**—The Statute of Uses gave rise to the deed of bargain and sale, and soon afterwards conveyances by lease and release were introduced in order to avoid the necessity of enrollment required by the Statute of Henry VIII, called the Statute of Enrollments.[47] By virtue of the Statute of Uses, which is adopted in this country, the deed of bargain and sale now in use here is equivalent to a deed of feoffment with livery of seisin, and has in practice superseded the lease and release.

548. **Consideration.**—If the existence of consideration is stated in a deed it cannot be denied on the question of validity of the deed. But in an action to recover the purchase price evidence may be introduced that the consideration was in fact not paid. Where the consideration is not stated in the deed, it may be set out and proved. The origin of the

[46] See § 96.
[47] See § 175.

statement of consideration in a deed has been discussed herein at § 172.

549. **Signature.**—Before the Statute of Frauds,[48] deeds were not necessarily signed, but this statute added the requirement of signing. The signature should properly be made to correspond with the name in which the title stands, but any signature which may be identified will serve.

550. **Origin of the seal.**—The early days of the common law was an age of profound ignorance, so far as knowledge of writing was concerned. There was not one in ten thousand who could read or write, a knowledge of letters being confined almost entirely to the clergy. Many of the barons could neither read nor write. As a result of this ignorance, seeing and hearing had to be relied upon rather than writing. The barons could not read, but they could recognize an impression made by their seal upon wax. Hence they carried a seal upon a ring, which they attached to all documents, that they might recognize them as their own. This use of a seal became so customary that it has prevailed ever since, but is now gradually falling into disuse, and is not of much importance in the execution of documents, except deeds, which commonly require a seal, although in some states a scroll is sufficient.

551. **History of seal.**—Sealing was not in general use among our Saxon ancestors. Their custom was for such as could write to sign their names, and to affix the sign of the cross, and those who could not write made their mark in the sign of the cross, as

[48] Stats., 29 Car. II, c. 3.

they still continue to do to this day. The Normans used the practice of sealing only, not writing their names, and at the time of the Conquest they introduced into England wax seals instead of the former English method of writing the name and affixing the sign of the cross, it being usual thereafter for every freeman to have his distinct and particular seal. The neglect of signing and dependance upon the authenticity of seals alone continued for a long while, during which time it was held in the English courts that sealing alone was sufficient. But in process of time the practice of using particular and appropriate seals was in a great measure discarded, until it was said by Blackstone, "that a seal is indispensable in order to convey an estate in fee simple, fee tail or for life." This has been the practice ever since the Statute of Charles II in England, and under our Statutes of Frauds in this country. Therefore, where the Legislature requires that a deed be signed, it is to be assumed that the sealing was also intended.[49] The kind of seal made use of is not important, and merely placing a finger on a seal already made is equivalent to sealing.

552. **Form of seal.**—At common law a seal is wax with an impression, and wax without any impression on it is not a seal. Under this distinction it was clear that the impression made the seal and the wax was only auxiliary to it. At the present time, however, a wafer placed at the end of a name, with a piece of paper on it, or without the piece of paper, and without any impression, is a seal, and a drop

[49] Jackson v. Wood, 12 Johns. 73 (N. Y.).

of sealing wax affixed in proper position and without impression or a bit of paper on it, would be a seal, provided the writing called for a seal. It is not necessary that each person should use his own seal, but he may adopt the seal of another. Several people may adopt the same seal as their own. There have been statutes in many of our states providing that a scroll shall be sufficient in place of the seal.

553. **Stamped paper.**—Writing on stamped paper is not sufficient as a seal, but a wafer must be attached for the purpose of sealing and not merely to hold papers together. The practice of making a printed impression on a paper for signature by a corporation is a greater departure from the common law than that of impressing the actual seal of the corporation upon the paper alone. The mere printing of a facsimile of the seal at the same time by the same agency as the printing of documents to be afterwards signed by the president and treasurer leaves nothing to be done by the officers of the corporation who alone were authorized to affix the corporate seal. The act at common law obtained its solemnity from the fact that the person signing the instrument did two independent acts: first, that of signing, and secondly, that of sealing, and these two processes do not take place when the seal is printed on the document,[50] and therefore such an instrument is not properly sealed.

554. **Seal imports consideration.**—Writing was, in the early days, a matter of some solemnity and therefore the rule of law grew up that every writing

[50] Bates v. Boston & New York Central Railroad, 10 Allen 251 (Mass.).

under seal imported a consideration, that is, that a step so solemn could not have been taken without some sufficient ground. This custom of sealing remained after the occasion for it had passed away and writing had been generally introduced. So that in all legal transactions a seal was added to the written document, and the writing so sealed and delivered was called a deed, in Latin *factum* (thing done). And for a long time after writing had come into common use, the written instrument if unsealed had at law no superiority over mere words. Nothing was in fact called a writing but a document under seal, and at the present time a deed or writing sealed and delivered still imports consideration.

555. **Present value of seal.**—The custom of sealing is a relic of ancient wisdom and is not without its real use today. There is some degree of solemnity in this form of conveyance. The seal attracts attention and excites caution in illiterate persons and thereby operates as a security against fraud. If a man's freehold might be conveyed by a mere note in writing, he might more easily be imposed on by signing such a conveyance when he really supposed he was signing a receipt, a promissory note, or a mere letter.

556. **Materials used in deeds.**—At common law all deeds must be written either on paper or on parchment. The reason given by Blackstone for this requirement was: "If it be written on stone or wood, this might be more durable, and if on leather, less liable to erasures, yet writing on paper or parchment has all the desirable qualities of other materials, for

there is nothing else so durable and at the same time so little liable to alteration, nothing so secure from alteration that is at the same time so durable." On the other hand, if a new substance should be invented having the advantages of paper, the reason of the law would fail and undoubtedly a deed on such a substance might be upheld. Ink is not indispensable and a deed may be sufficient if written or signed with a lead pencil. The dangers of doing this, however, are so obvious that we do not need to call attention to them.

557. **Short statutory forms.**—By statutes in many of our states, the form of deeds has been simplified, so as to insert in them all the essentials and leave out much of the verbiage which has been commonly used. For examples of such deeds, the reader should consult the Book of Forms, in Volume XIV, of "Modern American Law."

558. **Alterations in deed.**—Any alteration of the conditions of a deed is presumed in England to have been made before its execution. But in this country, the rule seems to be that there is no presumption either way, but it should be left to the jury as a matter of fact. So if the alteration appears to be written with the same pen and ink as the other parts of the instrument, the natural inference would be it was made before the sealing and delivery of the deed. But if it does not appear to be made with the same pen and ink no such presumption would arise and evidence would be necessary to explain it. The old English rule is no longer valid in this country, which was in effect that the law presumed that an

interlineation or erasure in a deed was a forgery. As a matter of practice today, all conveyancers, if they are obliged at the last minute to make interlineations or erasures in a deed, insert an accurate statement of what such changes consist of, as to the effect that "three words have been interlined in the tenth line of the above deed," or that "five words have been erased in the fourth line of the above deed," and this note should be inserted above the signature of the grantor. It was formerly held that an alteration or erasure in a material part of a deed, even when made by a stranger, would render it void. But now an alteration of a deed will not render it void, when made by a third party. Today the filling in of the date of the deed or names of the occupiers of the lands conveyed, or any similar clerical addition, if consistent with the purposes of the deed, will not render it void, even though done by the party to whom it has been delivered after its execution.[51]

[51] Minneapolis v. Hughes, 118 Minn. 404, 136 N. W. 1095, LEADING ILLUSTRATIVE CASES.

CHAPTER L.

SURRENDER AND RELEASE.

559. **Definition.**—A surrender is of two kinds: a surrender in deed, or by express words; and a surrender in law by operation of law. Where a tenant was not in possession he must use a deed of surrender. Surrender is defined by Littleton as "a yielding up an estate for life or years to him that hath an immediate estate in reversion or remainder, wherein the estate for life or years may drown by mutual agreement between them."[52]

560. **Effect of the Statute of Frauds.**—The Statute of Frauds put an end to informal surrenders but such as by operation of law were left unaffected thereby are common today. Therefore the acceptance of a new lease is a surrender by operation of law of an old lease if the new lease is for a longer term. A release made to a tenant at will is good, but to a tenant at sufferance would not be good. Since the Statute of Frauds, a lease for years cannot be surrendered by cancelling the indenture unless the same is evidenced by some instrument in writing. So cancelling a lease by tearing off the seal is not a valid surrender.

561. **By operation of law.**—The term "surrender by operation of law" is applied to cases where the owner of a particular estate has been a party to some

[52] Co. Lit. 337b.

act, the validity of which he is afterwards by law estopped from disputing, and which could not be valid if his particular estate had continued to exist. There the law treats the doing of such an act as amounting to a surrender. Thus if a lessee for years accepts a new lease from his lessor, he is estopped from saying that his lessor had not power to make the new lease; and as the lessor could not do this until the prior lease had been surrendered, the law says that the acceptance of such new lease is of itself a surrender of the former. If there is a tenant for life, with remainder to another in fee, and the remainderman comes on the land and makes feoffment to the tenant for life, who accepts livery, the tenant for life is thereby estopped from disputing the seisin in fee of the remainderman. The law says that such acceptance of livery amounts to a surrender of his life estate. The surrender is not the result of intention and there can be no intention in regard to it. It takes place independently and even in spite of intention.[58]

562. **Same subject.**—Under the old law, before the Statute of Frauds, if a lessee took a new lease from the lessor, it would operate as a surrender of the former term, although the second lease was for a shorter period than the first, or was by parol. And the reason is that the lessee by taking the second lease affirms that the lessor is able to make such a lease.

There may be a surrender by act and operation of law where there is a change of possession. Thus

[58] Lyon v. Reed, 13 M. & W. 285 (Eng.).

where there has been a change of possession with the assent of both parties, this amounts to a surrender of the term by act and operation of law.

563. **Orally with change of possession.**—An oral surrender of a lease without change of possession is forbidden by the Statute of Frauds. Where the lessee takes a new lease the surrender of the old lease is not the primary object of the transaction, but is a consequence grafted on it by operation of law. An actual surrender may be proved by showing a delivery of the key to the owner and its acceptance by him. The mere delivery of the key, of course, is insufficient and the tenant must go further and prove that the key was accepted.[54] Where the lessee gives up the premises and the lessor puts in a new tenant, there is a surrender by operation of law, unless it appears that the lessor clearly manifested his intention to hold the original lessee. This is a very difficult operation for the lessor and his attorney should examine carefully the local law as to just what is necessary to hold the original lessee.[55]

564. **Operation and effect.**—A surrender must be to one holding a larger estate than the surrenderor, so if there is an estate to A for life, remainder to B in fee, and if B enters with A's permission and conveys an estate for B's life, that would be a surrender of A's life estate as inconsistent with it. If the conveyance by B was really a release taking effect on the death of A that would be no surrender.

If there is a conveyance to A for life, remainder

[54] Dodd v. Acklom, 6 M. & G. 672 (Eng.).

[55] Auer v. Penn, 99 Pa. St. 370, LEADING ILLUSTRATIVE CASES.

to B for life, remainder to C in fee, and B by deed conveys to A, there is no merger here, as there is no merger unless the succeeding estate is larger. So if there is a grant to A for life, remainder to B for a thousand years, remainder to C in fee, there can be no proper surrender by A to B, as A has what the law denominates a larger estate than B. Therefore, the surrender would not effect a merger, but the estates would still stand as before. On the other hand if there is a grant to A for a thousand years, remainder to B for life, remainder to C in fee, A might surrender to B, and A's lease would merge in the life estate of B. The estate surrendered always merges in the estate of the surrenderee.

565. **Must operate at once.**—A surrender is always a present transaction and cannot take place in the future.[56] A contract to surrender a lease in the future would have no effect any more than an oral offer to surrender. Thus if A has an estate for ten years beginning in September and during the year he accepts a new lease for a year beginning with March, there must be a present surrender or none at all, for the court would decide that there must be a surrender now although the new lease is not to take effect until the future, with the result that there is no estate at all until March.

566. **Releases.**—Releases are of various kinds. In the first place, suppose one in remainder conveys to the immediate tenant, this is a release by way of enlargement and is the most common kind of release. In the second place, a release *per mitter le droit* is a

[56] Murrell v. Milward, 3 M. & W. 327 (Eng.).

release by a disseisee to a disseisor in possession and is merely, as the old French words indicate, a release of a right of entry or right of action. In the third place, there is a release *per mitter l'estate,* where one joint tenant releases to another. In the fourth place, there is a release by extinguishment, which was applied to easements where the owner of the easement had made a release to the owner of the property.

CHAPTER LI.

DELIVERY AND ACCEPTANCE.

567. **Necessity of delivery.**—It is fundamental that a deed is not operative until delivered, with intention to pass title to the grantee. For example, if a deed, after it was signed, should be stolen by a stranger off the desk of the grantor and placed on record, it would pass no title whatever to the grantee.

568. **Oral statement of delivery.**—The English courts have gone far in holding that when a deed is duly signed and sealed and formally delivered with suitable words of delivery, but is retained by the party executing, and when there is nothing to qualify the delivery or keeping the deed in the hands of the executing party, nothing to show that he did not intend it to operate immediately, it is a valid and effectual deed, and that delivery to the party who is to take it, or to any person for his use, is not essential. In an English leading case the grantor signed the deed and used the words, "I deliver this as my act and deed." The court intimates that this was sufficient delivery to make the deed operative.[57] So any other words or acts that sufficiently show that the deed was intended to be finally executed will do as well, and the deed is binding on the grantor before it comes into the custody of the grantee, or before he even knows of it. But, of course, if the

[57] Doe v. Knight, 5 B. & C. 671 (Eng.).

grantee has not previously assented to the making of the deed, he may refuse it.

In this country, on the other hand, it is generally considered necessary that the grantor put the deed out of his control and possession by delivering it either to the grantee or to some third person for the grantee, even though the third person is a stranger to the grantee and not his express agent.

569. **Delivery in escrow.**—Occasionally a deed is delivered to a third person not a party to it to be delivered up to the other party or parties upon the performance of a condition, and it is then said to be delivered as in escrow. For it is not a perfect deed until delivered up upon the performance of the condition; but when so delivered it operates from the time of its execution.[58]

570. **To whom delivery in escrow may be made.**—It is well settled that in order to place a deed in escrow it must be delivered to a stranger to it and a delivery either to the grantor's agent or to the grantee's agent will not accomplish that result. A delivery to the grantor's agent is no delivery as the grantor still has control; while a delivery to the grantee's agent will be absolute as a delivery to the grantee. It is possible, however, to make the agent of one of the parties the agent of both as a depositary of a deed and such a delivery will act as a delivery in escrow. So in a very recent case a deed was delivered by the grantor to the purchasing agent of the

[58] Williams, Real Property (6th ed.), p. 148; Alabama Coal & Coke Co. v. Gulf Coal & Coke Co., 165 Ala. 304, 51 South. 570, LEADING ILLUSTRATIVE CASES.

grantee to be held until the purchase money was paid and the court holds that this was good delivery in escrow.[59]

571. **Conditional delivery.**—Suppose the delivery is conditional, as where a man gives a deed to a third party with instructions to deliver it if he dies before he makes his will. The law in this country seems to be that in that case there was a delivery conditional on an event which has taken place and as in the case of an escrow the deed will take effect from the first delivery.[60] So if the grantor signs deeds and gives them to a third party, with directions to give them to the grantees if he dies, and the third party does deliver them after the death of the grantor, the court holds that the deed takes effect immediately. The distinction between this case and the deed in escrow is that where the future delivery is to depend upon the payment of money or some other condition, delivery will be deemed in escrow; where delivery is merely to await the lapse of time or the happening of some contingency and not the performance of any condition, it will admit the grantor's deed at once. Of course, the deed will not take effect as a deed until the second delivery, but when thus delivered it will take effect by relation from the first delivery.[61]

572. **Rights of intervening grantees in case of conditional delivery.**—In cases of conditional deliv-

[59] Alabama Coal & Coke Co. v. Gulf Coal & Coke Co., 165 Ala. 304, 51 South. 570, LEADING ILLUSTRATIVE CASES.

[60] Ruggles v. Lawson, 13 Johns. 285 (N. Y.).

[61] Foster v. Mansfield, 3 Metc. 412 (Mass.).

ery the rights of third parties will be protected, as the grantor is estopped from denying that a deed duly recorded is his. Thus if the grantor, after giving such a deed, makes another deed for the same property to another grantee, and delivers and records it, the first grantee will be protected. The title to the deed delivered on condition will relate back only when there are no third parties affected, and such relation back is necessary to make the deed effective. The registry system is very important in these cases, since when you have a third party, there is only one question, and that is, whether there is a record of the deed to this third party.

Interesting questions may come up affecting the rights of attaching creditors. For example, suppose there is a deed made and delivered to the attorney for the grantees for recording and after it was recorded the attachment of another creditor was levied before delivery from the attorney to the grantee, the courts will hold that this is a sufficient delivery to take precedence over the attachment. This delivery was an absolute delivery by the grantor of the instrument as his deed to a third person for the use of the grantee.[62]

573. **Delivery to third party.**—If the grantor gives a deed to a third party for the benefit of the grantee by any appropriate words showing that it is for the grantee's benefit, and the third party holds it for the grantee free from the control of the grantor, this undoubtedly constitutes a good delivery, and its operation will not be postponed until it is delivered

[62] Merrills v. Swift, 18 Conn. 257.

over to, or accepted by the grantee, as its acceptance will be in law presumed from the time it is placed in the hands of the third party.[63]

574. **Delivery to agent.**—It may be laid down that delivery to a third person, who is merely the agent of the grantor, is not complete until the grantee has assented, unless it is beneficial to the grantee so that an assent will be presumed. But if a deed is given unconditionally to a third person as agent of the grantee, then the delivery is complete if beneficial so that acceptance is presumed; but if not, then the actual acceptance will relate back to the original delivery. In the first case the better rule is that there must be evidence of delivery—enough must be shown to make the grantor who retains possession of the deed a bailee of it for the grantee. So the acceptance is presumed in case the grantee is entitled to the conveyance and has paid the consideration.

575. **When grantor retains control.**—Another distinction is that if a deed is delivered to a third person absolutely without reservation, though it is not delivered to the grantee until the death of the grantor, the deed which is so delivered on the death of the grantor is valid and takes effect from the first delivery. If the grantor, on the other hand, reserves control of the instrument, and it is subject during his life to his revocation, no present estate passes and the deed is invalid for want of delivery.[64] Whether

[63] Doe v. Knight, 5 B. & C. 671 (Eng.); Cook v. Brown, 34 N. H. 460, LEADING ILLUSTRATIVE CASES.

[64] Cook v. Brown, 34 N. H. 460.

the deed is in the hands of the third person or remains in the desk of the grantor is immaterial since in either case he can destroy it at his pleasure. To make the delivery effectual, the power of dominion over the deed must be parted with. So if the grantor, until his death, reserves the right to recall the deed from the hands of the depositary, there is no delivery.

576. **Recording as delivery.**—There is some authority in this country that even recording a deed is not sufficient evidence to show a delivery, but the better view is that, as the registry is a place for deeds completely executed and delivered, it is not right that a grantor should be allowed to say there was no delivery after he has himself recorded the deed. Suppose a deed is executed and recorded and the grantee, a minor, is out of the state at the time, and the grantor continues to pay taxes and then sells the land to a third party and the minor never knew of the deed until after the grantor's death. This case raises two important points: first, that the registry makes a prima facie case of delivery; and in the second place, that the acceptance is always presumed, even where there is no consideration, and can be overthrown only by actual proof of dissent.

An unrecorded deed is the sole evidence of title and it would be unsafe and altogether unusual to leave it with the grantor after its delivery. But a recorded deed is not sole evidence. The statute makes the record also proof and a copy of it is admissible, even though the party offering it has the deed itself in his possession. Therefore, the fact that the

grantor kept possession of the deed after the recording is of no importance without further evidence that he did not intend to deliver the deed. If the deed was a gift and the grantor subsequently changed his mind and decided not to make the gift, he has no right to do so in this way.[65] It is almost universally true that people today take very little care of their deeds, as they depend on the registry for their title. Therefore, possession of a deed by the grantor after recording is of little weight as bearing on the question of delivery.

577. **Acceptance.**—It is very necessary that a deed be accepted to render it effective, although an acceptance will commonly be presumed on account of the beneficial character of the deed. Acceptance by the grantee is, to be sure, necessary to constitute a good delivery, for a man may refuse even a gift. But it is equally true that such acceptance need not be manual, and it is also certain that simple assent to the conveyance given even before its execution is a sufficient acceptance. It is furthermore the rule that where the grant is a pure, unqualified gift, the presumption of acceptance can be rebutted only by proof of dissent, and it makes no difference that the grantee never knew of the conveyance, for as his assent is presumed from its beneficial character, the presumption can be overthrown only by proof that he did know of it and rejected it. Otherwise it might be properly asked: How could a deed be made to an infant of such tender years as to be incapable of assent? The ceremony of the ancient doctrine in

[65] Lessee of Mitchell v. Ryan, 3 Ohio St. 377.

respect to the delivery of deeds has gradually worn away until a doctrine more consistent with reason and the habits of the present generation now prevails. It has been said that the best thing a grantee can do with his deed after recording it, is to burn it, and there is something in the suggestion. The record is the best possible evidence. The chief use of deeds today is by lawyers examining titles, who commonly ask for the last deed as a matter of convenience to obtain a starting point.

CHAPTER LII.

OTHER ESSENTIALS TO VALID CONVEYANCE.

578. **Execution defined.**—The sealing and delivery of a deed are termed the execution of it. The deed need not be read by or to the grantor as he is supposed to know its contents if he signs it.

579. **Who may convey land—Infants and lunatics.**—A minor or infant, a name properly given to all persons under the legal age, and also an idiot or lunatic, who may hold land, are incapable of making any valid deed or conveyance. The power to convey the land of infants and lunatics when necessary is commonly placed by statute in their guardians or conservators.

Although formerly the deed of a lunatic was absolutely void, the tendency of the courts today is to hold it voidable merely, and it may thus be sustained where for the advantage of the lunatic. As for the distinction between void and voidable, a deed is void which has no force or effect whatever, while it is voidable where it has some effect but may be legally avoided.

580. **Who may convey land—Disseisee.**—It was the old doctrine at common law that one who had been disseised of land could convey no title, as he could make no livery of seisin, and if he purported to do so by making a deed of his interest, his deed passed nothing, as the title still remained in him, but

he must first bring action to recover the land from the disseisor.[66] On the other hand, if the disseisee makes a deed after he has entered upon the land, this deed will be good. The deed is good in any event against everybody except the disseisor and those claiming under him. It is commonly provided now by statute that a deed by a disseisee is good, and in some states the courts themselves have reached the same result without the aid of statute. The doctrine that the deed of a disseisee is void never applied to easements, as there is no seisin of easements.[67]

581. **Aliens.**—Under the old law prevailing at the time of the feudal system, if an alien or foreigner were to buy land, the king might, at any time, assert a right to such an estate, unless it were merely a lease taken by a subject of a friendly state for occupation for himself or servants, or for the purpose of any business, for a term not exceeding twenty-one years; and under the old law the conveyance to an alien of any greater estate in land in England was the cause of forfeiture to the crown, which might seize the lands after proper legal proceedings, known as inquest of office, for the purpose of finding the facts in the case. Before any such inquest an alien might convey to a native, and such conveyance would be valid for all purposes except to defeat the prior right of the king, which would still continue. In this country, the title of aliens to lands within the several states is a matter of state regulation. In most states,

[66] Brinley v. Whiting, 5 Pick. 348 (Mass.).
[67] Randall v. Chase, 133 Mass. 210, 214.

aliens are able by statute to hold and transmit real estate, either without restriction or subject to proper conditions as to residence, etc.

582. **Deed to grantor.**—As two parties are necessary to a deed, it follows that a grantor is incapable of taking under his own deed. But in a recent case a grantor gave land to herself and three others, and the court holds that the grantor has a one-fourth undivided interest in the land.[68] This case reaches a correct result, as the court finds that a tenancy in common among the grantees is created, and therefore on its face the deed passed one-fourth of the estate to each of the grantees. As a deed to the grantor is inoperative there has been no conveyance of one-fourth of the estate and the result is correct. If the deed had created a joint tenancy the joint tenants aside from the grantor would have taken the whole estate and the grantor would have been left with nothing.[69]

583. **An incorporeal hereditament.**—Even an incorporeal hereditament, which is a chattel interest, requires a deed. Therefore a lease of a fishery[70] in writing, but not under seal, is insufficient; and likewise of a license to hunt.[71]

584. **Exception of strip subject to easement.**—Where a landowner granted an easement in a certain strip of land and later made a deed to another of the whole tract "excepting a strip of land heretofore deeded," the court holds that the fee is excepted

[68] Green v. Cannady, 77 S. C. 193, 57 S. E. 832.
[69] Cameron v. Steves, 9 N. B. 141 (Can.).
[70] Somerset v. Fogwell, 5 B. & C. 875 (Eng.).
[71] Bird v. Higginson, 2 A. & E. 696 (Eng.).

from the second deed, and therefore the second grantee obtains no title even though the owner of the easement fails to use the land for the statutory period.[72] This result has the weight of authority behind it although the other result would be more convenient, as less likely to leave the title to strips of this character separated from the balance of the tract.

[72] Spencer v. Wabash Railway Co., 132 Iowa 129, 109 N. W. 453.

CHAPTER LIII.

ABSTRACTS OF TITLE.

585. **Importance.**—One of the most important duties an attorney-at-law is called upon to perform is that of giving an opinion upon the title to real property. To be in a position to pass upon titles, the lawyer should be familiar with both the common law and statute law as regards real estate, and especially that branch of the law which refers to the execution and recording of deeds and mortgages and other instruments affecting title or constituting liens thereon. While the statutes regarding the execution and recording of conveyances are very similar in the various states, they are not uniform.

586. **Abstract offices.**—In all the older settled portions of our country, and in the counties having a large population, the records have become so voluminous, that individuals or corporations have established what are known as abstract offices, which undertake, for remuneration, to furnish abstracts of title to real estate in the jurisdiction. In some cases these abstracts of title are guaranteed by the person or company making them, and in the large cities this class of work is done almost solely by the large corporations, who guarantee the abstracts they furnish. The value of such abstracts depends wholly upon the care with which they are made. But as a general rule they are unreliable, because they are not full

and complete enough, although they are of assistance to one who desires to go to the original records to examine the title. When such an abstract is given an attorney upon which to base his opinion of the title to the land, he should state that the opinion is based only upon the conveyances shown in the abstract. If the client desires a really correct opinion, the lawyer should use the abstract simply as an index to the records to be examined, and frame his opinion from a careful examination of the original records and upon the legal sufficiency of each conveyance recorded therein.

587. **Method of examining title.**—When called upon to investigate the validity of a title it is always advisable to procure an abstract of the title as a foundation for the work. Then write out carefully a description of the property, the title to which is in question. This description should be compared with each description in the line of conveyances to ascertain if the land is included therein. If it is a description by metes and bounds, a diagram of the property showing the direction and distance of each line will be helpful. The descriptions will often be found imperfect and impossible ones, and incomplete in giving all the boundaries, and these defects should appear in the abstract, and be rectified if possible. In tracing the title from the original grant, the abstracter may trace it from the original grantor without reference to any incumbrances placed upon the land by the various owners while in their possession, and then afterwards make an independent examination of these liens. Or, he may

trace both the title and the liens thereon at the same time from the original grantor, step by step. When an undischarged lien is discovered, the question arises as to whether or not it may be outlawed. If not, it is a cloud upon the title. When there is an uninterrupted chain of title from the original grantor to each successive grantee, and the title has been transferred inter vivos by deed, the tracing of the title is very simple. But this is not usually the case, and it may be found that the property has been sold through the probate court or on execution to satisfy debts. In such a case it may be necessary to examine into the jurisdiction of the court and the proceedings had, to ascertain whether they were regular and in accordance with law, and whether the sale of the property was regular and according to the order issued. While the middle names of the various grantors do not matter, yet it is important to see that the first name is the same as that of the party to whom the property was deeded.

The abstracter should examine each deed to ascertain if it has been properly executed and acknowledged in accordance with the law in force at the time of its execution, which may involve the question of satisfying the law as regards revenue stamps. The covenants of the deed should be examined also to ascertain if any easements are outstanding. As to the dower or curtesy interest, the deed, unless executed by both husband and wife, may be subject to such an outstanding interest. And this is so though the acknowledgment recites that the grantor is single, since such a recital is no part of the deed.

The abstracter must ascertain whether or not the grantor was single at the time, and if he does not know, the fact should be so stated in the abstract.

588. **Title passing on death.**—When there is a break in the chain of title caused by the death of the owner and the sale of the property, or its distribution under the laws of descent to the heirs, it may be necessary to examine the records of the probate court with reference to the number, names and ages of the heirs, where the owner died intestate, because if the owner died intestate his lands are divided among his heirs according to the provisions of the statute, each in his proportionate share. And where some of the children are dead and left issue, the issue will inherit under the statute. Where the owner leaves a will, and it is not contested, the land passes according to the provisions of the will. Where the property of an intestate owner has not been sold the abstracter will often find that it has been partitioned, in a legal proceeding, among the heirs. When this is the case it is necessary to see that the proper steps have been taken, and that the property was by this proceeding given to the person through whom the title comes. But as the lands of a deceased owner pass to the heirs without administration or other proceeding, it may be sufficient if they have simply united in a transfer to the next grantee, provided the rights of creditors of the deceased are properly barred.

Where there have been no probate proceedings, then the abstracter must ascertain whether or not there has been any other judicial determination as to the number of heirs. By statute persons inter-

ested in the land may institute proceedings in order to determine who are the heirs of a deceased person where there is any doubt about it. In all such cases the abstracter should note the number of heirs that were named, and state that the record does not disclose whether there are any more heirs or not.

589. **Liens.**—The break in the chain of title may be occasioned by a foreclosure of a mortgage, in which case the abstracter should see that the proceedings complied with the statutes governing foreclosures, as to advertising the sale and the like, for if these have not been complied with, the sale is void, and no title passes to the purchaser, unless he has gone into possession and retained such possession the statutory period to obtain title by possession. In case there has been a foreclosure in equity, the abstracter should ascertain whether the court has acquired jurisdiction of the person made defendant, for if it has not the proceedings are void. So in all cases where the title has been transferred by an attorney in fact, the abstracter should examine and find out whether the power of attorney has been properly executed, and whether the attorney in fact exercised the power given, and no other. Both the power of attorney and the deed should be recorded.

In tracing the incumbrances and liens placed upon the title by the various owners, the abstracter may have more difficulty than in tracing the title itself. If there is a mortgage upon the land, and it has been paid, it should be discharged of record, or it still shows as an outstanding obligation, and constitutes a cloud on the title. It will be found that a great

number of mortgages have been paid and satisfied in fact, yet have never been discharged or entered on the record as satisfied. Thus a party owing on a mortgage will pay same and neglect to have the proper entry of the cancellation of the mortgage put upon record. Such mortgages may be subsequently discharged by the mortgagee's entering upon the record that the mortgage is discharged; or the mortgagee may execute a release of the mortgagee under seal and have it recorded. But where the mortgagee is deceased and the mortgage with the satisfaction is lost, suit to remove the cloud from the title may be necessary.

Where the land has been sold under an execution, it should be ascertained from the records whether there has been a valid judgment rendered, for without this there can be no valid execution and sale. If there is an execution levy it must be enforced in most states within a certain number of years, and in all states within the life of the judgment. The abstracter is also required to examine what taxes have been assessed against the land, and whether there are any outstanding tax titles. Also he must ascertain whether any special assessments or taxes have been levied for municipal purposes if the land is situated in a city or town.

590. **Liability of examiner of title.**—One who makes an examination of title to land, and gives a certificate as to it, is not an insurer of the title; but becomes responsible for mistakes made through ignorance or want of care and legal knowledge. The general rule is that one who holds himself out as

capable of doing certain work must possess the ability and exercise the care required, and is responsible for injury suffered by reason of his inability to do so.[73] The examiner should never in any form of words insure a title. The safest form declares merely that you have examined the records, and states what you found there.

[73] Chase v. Heaney, 70 Ill. 268; Rankin v. Schaeffer, 4 Mo. App. 108; Anderson v. Spriestersbach, 69 Wash. 393, 125 Pac. 166.

CHAPTER LIV.

COVENANTS OF TITLE.

591. **History of covenants of title.**—Covenants of title, as a substitute for warranty, were introduced towards the close of the seventeenth century. They were five in number: First a covenant of seisin; second, a covenant that the grantor had given a perfect right to transfer title; third, a covenant that the grantee should quietly possess and enjoy the premises without interruption, called a covenant for quiet enjoyment; fourth, a covenant against incumbrances; and, fifth, a covenant that other deeds or instruments should be executed as might be necessary to perfect or confirm the title. This was called a covenant for further assurance. Another covenant of a later growth, which is now more employed and relied upon than any other, is a covenant of warranty.

592. **Meaning of covenants.**—Covenants, or covenants of title, have nothing to do with title so far as the conveying or withholding of it is concerned, though it is a matter of common belief that a warranty deed with full covenants of title conveys a better title than a quitclaim deed. As a matter of fact, in either case the grantor simply conveys the title which he has, and if he has no title it makes no difference whether he warrants it or not, none passes by the conveyance. So that covenants in a deed have nothing to do with the effect of the deed upon the

title immediately. They may indirectly, because if a warranty deed is given and the grantor afterward acquires a good title, the warranty deed estops him from claiming anything under the new grant he has acquired. But the real value of covenants of title, as contained in a warranty deed, is that the grantee may have a right of action against the grantor if the title fails.

Covenants for title are now chiefly of six kinds: First, of seisin; second, right to convey; third, against incumbrances; fourth, quiet enjoyment; fifth, further assurance; sixth, warranty. The first, third and sixth are usual covenants in this country, and are included in most printed forms of deeds. The first three are statements of existing fact, and the others are promises for the future. In the case of the first three the covenant is broken immediately if at all.

593. **Title defined and explained.**—Title is defined to be the means whereby the owner of lands comes into the legal possession of his property. A perfect title requires the union of possession and the right to the thing possessed. At the common law lands could not be conveyed unless the grantor was in possession and could give livery of seisin. It was against public policy to covenant to convey or sell lands when you could not put the purchaser in possession, since it was supposed to stir up litigation and cause a multiplicity of suits. The primary meaning of seisin is possession and the right of possession; its secondary meaning is possession alone.[74]

[74] See § 5.

594. **The covenant of seisin.**—In a number of the states it is held that the covenant of seisin means possession only, and it is therefore not broken if the grantor is in possession and delivers such possession to the grantee.[75] Thus, under this rule, if the grantor is in possession wrongfully at the time of the making of the deed, there would be no breach of the covenant. But in these states if there is anything in the covenant indicating that the vendor is in possession of a particular title, as an indefeasible fee simple, then there is a breach of the covenant if he does not hold under that particular title. But in most of the states the courts repudiate the Massachusetts rule, and hold that possession alone is not sufficient to satisfy this covenant of seisin, and that it means a covenant of title as well as possession. That is, most of the states hold that a covenant of seisin imports that the grantor is not only in possession, but has the right of possession.[76] In such states the covenant of seisin is defined to be an assurance to the purchaser that the grantor has the very estate in quality and quantity which he purports to convey, following the English rule,[77] and the covenant is broken if the grantor has merely an estate tail, or there is an outstanding estate for life or for years.[78] But the covenant of seisin is not broken by the existence of an easement which does not affect the seisin of the grantor, as a public highway or execution lien.

[75] Bearce v. Jackson, 4 Mass. 408; Montgomery v. Reed, 69 Me. 510.

[76] Lockwood v. Sturdevant, 6 Conn. 373.

[77] Howell v. Richards, 11 East 633 (Eng.).

[78] Clark v. Conroe's Estate, 38 Vt. 469; Comstock v. Comstock, 23 Conn. 349; Rawle, Covenant for Title (5th ed.), § 59.

When the covenants refer to wild lands they are construed to be in the possession of the person holding the government title. Thus if the holder of such title covenants that he is well seized of the lands, it is sufficient if the lands are not in the possession of another, and he has constructive possession.[79]

The covenant is broken, if at all, as soon as the deed is given, and the Statute of Limitation governing the right of action for the breach of the covenant begins to run immediately. The suit for the breach must be brought within the time fixed by the Statute of Limitation or the grantee cannot recover. When a breach of this covenant occurs and an action is brought, the plaintiff is not required by the course of the common law to aver eviction in his declaration, or to allege any special damages, nor is he required to set up any particulars of the paramount title. All that the plaintiff need do is to negative the title of the defendant. The defendant must plead affirmatively that he had a good title and support such plea by proof. If no proof is introduced the plaintiff is entitled to recover, the reason being that at common law there was no registration of title deeds, and the evidences of title were the deeds that were given from the grantor to grantee, and the grantor was supposed to have in his possession at the time of granting the land all the evidence of title. The grantee, therefore, if in doubt as to his title, can bring suit and compel the grantor to show that the

[79] Matteson v. Vaughn, 38 Mich. 373; St. John v. Palmer, 5 Hill 599 (N. Y.); Sherwood v. Landon, 57 Mich. 219, 23 N. W. 778.

title granted is the very title granted in the deed, the burden being upon the grantor, or defendant, to prove affirmatively that the deed he gave was a good and sufficient deed covering the very title which it purported to convey.[80] But this rule of the common law has been changed by statute, so that generally it is necessary in drawing pleadings for breach of the covenant of seisin to set forth affirmatively in what manner the covenant has been broken.

595. **The covenant of the right to convey.**—The covenant of seisin in those states that follow the rule that it is a covenant of title and not merely of possession, is equivalent to or synonymous with the covenant of right to convey. But where seisin means possession merely, and the party covenants that he has a right to convey, it is interpreted that in addition to being in possession he also has the title.[81]

The covenant of right to convey is broken, if at all, as soon as made, and is governed by the same rules in regard to pleadings and damages as the covenant of seisin.[82]

596. **The covenant against incumbrances.**—A covenant against incumbrances is regarded in this country as an independent covenant, and is usually worded as follows: "And that the premises are free and clear of all incumbrances whatsoever." When this covenant stands alone it is broken as soon as made, if there exists any incumbrance on the land.

[80] Abbott v. Allen, 14 Johns. 248 (N. Y.); Griswold v. Wilson, 36 Iowa 156; Williams v. Cushing, 34 Me. 370.

[81] Thackeray v. Wood, 5 B. & S. 325 (Eng.); Same case, 6 B. & S. 766 (Eng.).

[82] Willson v. Willson, 5 Foster 229 (N. H.).

It is sometimes coupled with the covenant for quiet enjoyment, and as the covenant for quiet enjoyment is a covenant in futuro, when the two are thus coupled, it makes of the covenant against incumbrances a contract in futuro.[83] The time of the breaking of the covenant is important on account of the Statute of Limitation beginning to run from that time. So that if the covenant against incumbrances stands alone, it is broken when the deed is made and the statute begins to run immediately, which is not the case if it is coupled with the covenant of quiet enjoyment, in which case the covenant is not broken until the quiet enjoyment is disturbed, that is, until an action is brought by someone to oust the party.

597. **Same subject—Meaning of an incumbrance.**—An incumbrance, within the meaning of the covenant against incumbrances, has been defined to be any right to, or interest in the land, that may subsist in any third person to the diminution of the value of the land, but consistent with the passing of the fee. This covers not only mortgages, execution levies and liens upon the land, but also everything in the way of easements, and the like. The covenant in effect means that the title is not affected by any interest which any third person possesses which may interfere with the possession and enjoyment of the premises.[84]

As a general rule any lien or right held by a third person which affects the title or use and enjoyment of the premises is an incumbrance within the mean-

[83] Rawle, Covenants for Title (5th ed.), § 7174.

[84] Post v. Campau, 42 Mich. 90, 3 N. W. 272; 2 Greenleaf, Evidence, p. 242.

ing of the covenant. Thus a tax lien, or a restraint upon building is held to be an incumbrance.[85]

598. **Easements as incumbrances.**—A covenant against incumbrances commonly embraces easements, but to determine what easements are included in the covenant the courts will in each case look to the intention of the parties and have not felt bound to give the written words their literal meaning, which would cover every sort of an incumbrance. So the presence of a public sidewalk has been held not a breach of the covenant, or an open and notorious right of way across the land may not be.[86] This has sometimes been put on the ground of notice, sometimes on the ground that the courts feel that the words of the parties should be strictly construed.[87]

599. **Same subject—Effect of breach of covenant against incumbrances.**—A covenant against incumbrances standing alone is broken as soon as the deed is given, if at all, but since it is treated as a covenant of indemnity by the courts, the grantee could only recover actual damages. That is, the covenant obligates the covenantor that he will make the title good, and he must reimburse the grantee for what he has been compelled to pay out to satisfy the incumbrance. If the grantee brought suit before satisfying the incumbrance he could only recover nominal damages, since he had suffered no actual damages as yet.[88] And as only one action could be brought

[85] Ayling v. Kramer, 133 Mass. 12; Burbank v. Pillsbury, 48 N. H. 475.
[86] Van Ness v. Royal Phosphate Co., 60 Fla. 284, 53 South. 381.
[87] Desvergers v. Willis, 56 Ga. 515.
[88] Van Valkenburgh v. Milwaukee, 30 Wis. 338.

for the breach of the covenant, the recovery of nominal damages would be a bar to another suit after having discharged the incumbrance.[89] Where the incumbrance is an easement the covenantee will be entitled to recover such damages as are the proximate consequences of such easement, but he will not be entitled to recover special damages arising because of some particular use which he might make of the land. The rule of recovery is not actual damages, but rather the difference between what the property would be worth on the market without the easement, and what it is worth with the easement as it exists.[90]

If the incumbrance be for an unexpired term of years, the extent of that term or the interest upon the purchase money for the term is the measure of damages. So if the rent which the tenant on the land is to pay amounts to the interest on the purchase price, the covenantee is entitled to the rentals and could recover no damages.[91] Where property is sold subject to incumbrances, such incumbrances should always be excepted from the operation of the covenant.[92] In Michigan a covenant against incumbrances is broken immediately if there is an incumbrance against the land which can be then discharged, but if the incumbrance cannot be immediately discharged, the Statute of Limitations does not begin to run until the incumbrance can be discharged.

[89] Reed v. Pierce, 36 Me. 455.

[90] Merry v. Allen, 39 Iowa 235.

[91] Pugh v. Chesseldine, 11 Ohio 109; Terry v. Drabenstadt, 68 Pa. St. 400; McGary v. Hastings, 39 Cal. 360.

[92] Davenport v. Davenport, 52 Mich. 587, 18 N. W. 371; Stilson v. Gibbs, 40 Mich. 42.

600. **The covenant for quiet enjoyment.**—This is a covenant or assurance against disturbances consequent from a defective title, and is a covenant usually found in short leases.[93] When this covenant is broken by the eviction of the grantee at the instance of the holder of the paramount title, the grantee is entitled to recover, in a number of states, the value of the premises at the time of the eviction.[94] But the overwhelming weight of authority in other states is that the rule of damages for the breach of this covenant is the same as that for the breach of the covenant of seisin, and that is, the purchase price of the land, and not its value at the time of being deprived of it.[95] In case of a breach of the covenant for quiet enjoyment in a lease, it was first held that the measure of damages was the amount of the rent paid.[96] But this rule has been so far modified by the weight of authority that the tenant is permitted to show the value of the premises at the time of the breach, and can recover actual damages.[97]

601. **The covenant for further assurance.**—The word assurance is the old term for deed, and means the same as the deed or instrument by which the title or additional claim of title is transferred. The grantee is assured by this covenant that the grantor will execute any additional deed which may be necessary to make the title perfect. So that if in the

[93] Howell v. Richards, 11 East 633 (Eng.); In re Duquesne Bank's App., 74 Pa. St. 429.

[94] Goodman v. Russ, 14 Conn. 210.

[95] Foster v. Thompson, 41 N. H. 373.

[96] Kinney v. Watts, 14 Wend. 38 (N. Y.).

[97] Mack v. Patchin, 42 N. Y. 167.

future the grantor obtains a better title than he had at the time of conveying, the grantee may go to him and secure a further quitclaim deed, and make him pay the costs of any proceeding necessary to secure such further deed.[98] An action at law cannot be maintained for a breach of this covenant until the covenantor has been requested to make such further assurance. But only such acts may be required of the covenantor under this covenant as are necessary, practicable, and lawful.[99] The great advantage of this covenant is that it gives the grantee the power to enforce specific performance of the transfer of title, where the grantor has subsequently come into possession of a further and better title.[1]

602. **The covenant of warranty.**—The covenant of warranty is the most important in a deed in this country. This sweeping covenant of general warranty includes nearly all the other covenants. It dates back to feudal times, and was the covenant which enabled the tenant in tail to bar the entail by a common recovery. This covenant as usually worded is, that the grantor warrants and defends the granted premises against all claims of all persons whatsoever. It is more than a covenant for quiet enjoyment, being a covenant to defend both the possession and the estate granted in the land, giving the grantee a right to call upon the grantor to make such defense as should be made in case an adverse title is set up,[2] this being the only covenant

[98] Flanagin v. Hambleton, 54 Md. 222.
[99] Heath v. Crealock, L. R. 10 Ch. 22 (Eng.).
[1] Shermer v. Shermer's Executors, 1 Wash. 266 (Va.).
[2] Russ v. Steele, 40 Vt. 310.

of title in which the grantee can call upon the grantor to defend the title.[3]

Suppose there is a general covenant of warranty and a covenant against incumbrances, and a third person who holds a mortgage upon the land brings a foreclosure suit against the vendee of the land. If the covenant only consisted of the one against incumbrances, the grantee could not compel the grantor to come in and defend the foreclosure suit. And if the suit went against the grantee he would have to pay the mortgage and then bring an action on the covenant against incumbrances to recover the amount paid out. But where the general covenant of warranty exists, the grantee, upon giving notice to the grantor, may compel him to come in and defend the suit, and if the adverse claimant prevails and gets judgment, that judgment is conclusive against the vendor, so that the grantee may have judgment against him for the value of the premises. Upon due notice given to the grantor, when a general covenant of warranty exists, he is obliged to come in and defend the title or judgment may be taken against him. This notice must be definite and unequivocal, and expressly require the covenantor to appear and defend,[4] and by statute in some of the states the notice is required to be given in writing.[5]

The judgment given where the covenantor has been properly notified to appear and defend is conclusive upon him, since he thereby becomes either

[3] Boston & Me. R. R. v. Lowell & Lawrence R. R., 124 Mass. 368.
[4] Schmidt v. Rose, 6 Mo. App. 588.
[5] Mason v. Kellogg, 38 Mich. 132.

actually or constructively a party to the suit. The general rule is that the judgment of a court does not bind persons who are not parties to the action; notice to the covenantor must be given to bring him out of this rule. For if he is not properly notified the judgment is not binding upon him.[6]

So where the covenantor is not notified, and judgment is taken against the grantee in favor of an adverse claimant, the grantee may then bring suit upon the covenant of warranty, and by showing that the title was defective recover judgment against the grantor for breach of warranty, the only difference being that two suits must be gone through with in this case.[7]

603. **History of warranties.**—The present system of warranties is comparatively modern. Under the old feudal law, if the title of the holder of the fee was disputed, he had a right to call upon his lord to warrant or insure the title. And if the lord failed to do this, and the tenant was evicted, the lord was bound to give him another feud of equal value. This duty imposed upon the lord to protect the tenant in his title was a part of the feudal system and created without any covenant, but was a natural and inseparable incident of tenure. When the ancient livery of seisin became altered into a deed, the word used, *dedi,* meaning gift, implied a warranty. After the Statute of Quia Emptores, the word *dedi* merely implied a warranty during the life of the donor. And as the result of this and the fact that the war-

[6] Chamberlain v. Preble, 11 Allen 370 (Mass.).

[7] King v. Kerr's Admrs., 5 Ohio 155; Claycomb v. Munger, 51 Ill. 373.

ranty became in great measure a mere personal contract, the practice of introducing express warranties became almost universal. The warranty had two effects: First, the grantee could call upon the donor to defend his title to the land; and secondly, the warranty operated as a rebutter barring the warrantor and his heirs from claiming any portion of the estate granted.

604. **Same subject—General and special warranties.**—The covenant of warranty may be general, as against the whole world; or special, against particular persons. The covenant of warranty may be limited to the acts of the grantor himself, or otherwise limited.[8] Where the warranty is general the adverse claim must be valid and not a fictitious claim. The covenant is not that no adverse claim shall arise, but that the title is good, though he is obliged to defend against fictitious claims.[9]

As a rule the covenantor is not obliged to defend against a fictitious title unless: 1. The tortious act is done by the covenantor himself or at his instigation. 2. Or the covenant is against the acts of some third person specifically. 3. Or the covenant is against all persons claiming or pretending to claim title.[10] The covenant of warranty does not extend to the right of eminent domain. The sovereign power has always this right, and it is not a breach of any warranty for lands to be taken by this right.[11]

[8] Joiner v. Ardmore Loan & Trust Co., 124 Pac. 1073 (Okla.), LEADING ILLUSTRATIVE CASES.

[9] Avery v. Dougherty, 102 Ind. 443, 2 N. E. 123.

[10] O'Keefe v. Kennedy, 3 Cush. 325 (Mass.).

[11] Stevenson v. Loehr, 57 Ill. 509.

Nor does warranty extend to cover any other lawful act of the general public.[12]

605. **Collateral warranty.**—The Statute De Donis, which was passed to protect the estates of the greater lords, had such a marked effect that various efforts were made to repeal it and to avoid its effects in other ways. One of these methods was the doctrine of collateral warranty, which was the earliest method of avoiding the Statute De Donis. The Statute De Donis expressly declares that tenants in tail should have no power to alienate land given, and so if the father did sell with warranty this warranty would not bar the son from claiming the land. But if the brother of the tenant in tail joined in this alienation with warranty and died without issue, so that the son of the tenant in tail became his heir, this warranty called collateral to the entail bound at common law the son of the tenant in tail.

606. **What constitutes a breach of covenants of warranty.**—At common law eviction was necessary to a breach of covenant for quiet enjoyment. An eviction at the present time means something of a grave and permanent nature, something more than a trespass. So that it is not necessary at the present time that the vendee should be dispossessed by the holder of the paramount title. If such an adverse claim is set up he may surrender possession or purchase the adverse interest and bring suit against the grantor for breach of covenant. But there must be at least a claim of right of possession by the adverse holder, who must demand possession and

[12] Carter v. Scaggs, 38 Mo. 302.

threaten eviction. Then, if he has a good title the vendee may surrender possession and look to his warranty. But unless the grantee notify the warrantor he may have the burden of showing that such adverse claim is genuine.[13] In every case the holder of the adverse title must assert it in a hostile manner, so that the possession is actually put in jeopardy by the hostile movement of the adverse claimant.

There may be a constructive eviction, as where the land granted is held by a third person, claiming adversely. In such a case the covenantee may maintain his action on the warranty immediately, since he is out of possession and cannot gain it without suit.[14] But if the lands are wild lands, which are presumed to be in the possession of the person who holds a valid title to them, yet if some third person claims such title to the lands this is not sufficient to constitute a breach of the warranty before eviction is attempted.[15] The adverse claim of a third person by reason of which the grantee cannot obtain possession must be under a claim of title, and not merely adversely, as simply because he is in possession.[16]

607. **When breach occurs—English rule.**—The English view is that if the technical breach occurs first when the damage occurs, the holder may sue then. So where the defendant made a conveyance to B with a covenant that he was seized, and the

[13] Hamilton v. Cutts, 4 Mass. 349; Axtell v. Chase, 83 Ind. 546; Thomas v. Stickle, 32 Iowa 71.

[14] Fritz v. Pusey, 31 Minn. 368, 18 N. W. 94.

[15] Matteson v. Vaughn, 38 Mich. 373; Green v. Irving, 54 Miss. 450.

[16] Easement as breach of covenant, Van Ness v. Royal Phosphate Co., 60 Fla. 284, 53 South. 381.

devisee of B sues on the covenant, the court holds that the covenant passes with the land to the devisee and as long as the defendant has not good title, there is a continuing breach. So there is a substantial breach during the possession of the devisee. The covenant is not like a covenant to do some particular thing, which not being done the covenant is broken once for all. But it is in the nature of a covenant to do a thing as the exigency of the case may require. So in this case, there was a breach in the lifetime of B, but according to the spirit of the covenant, the substantial breach is in the time of the devisee who has thereby lost the fruit of the covenant in not being able to dispose of the estate. This is a covenant which runs with the land, but if it may be broken but once and ceases eo instante that it is broken, how can it run with the land?

608. **When breach occurs—American view.**—Where there is a covenant that the land is free from all incumbrances, the general American view seems to be that this covenant was broken as soon as made, and that the right left is not in the nature of a covenant which runs with the land, but is a mere right of action which is assignable only under state statutes. And furthermore, that any action at all, under the covenant, would be barred in twenty years from the date of the original deed, as that is the date of the breach. The English doctrine set out in Kingdon v. Nottele[17] that the breach is a continuing breach is not followed in this country. The assignee of the chose in action in this country can always sue either

[17] 1 M. & S. 355 (Eng.).

under a statute or in equity in the name of the original covenantee.

609. **Whether warranty runs with land.**—The question arises as to who may take advantage of the covenants of title. The first grantee may, of course, take advantage of them. When he sells the land, what is the effect of the previous covenant? If the covenant is purely personal it does not run with the land, or follow the land to successive purchasers, and therefore cannot be enforced by subsequent purchasers. Covenants are said to run with the land when the purpose is to give future protection to the title conveyed; and not to run with the land, when their whole force is spent in giving assurance against something which immediately affects the title and causes the person damage; that is, present damage.[18] Where the covenant runs with the land, the owner for the time being is entitled to the benefits of such warranty, the covenant passing along with the land for the benefit of any subsequent purchaser. Covenants for quiet enjoyment, warranty, and for further assurance run with the land, while covenants of seisin, right to convey, and against incumbrances do not run with the land.

610. **Liability of prior covenantors—Effect of release of one.**—The American law is unquestioned that the present holder of title can pick out any prior covenantor he desires and bring suit against him. Suppose, for example, successive grantors, A, B and C, each making covenants of warranty, and C is evicted by paramount title; suppose C recovers

[18] Post v. Campau, 42 Mich. 90.

from A and then sues B on the covenant between B and C; in that case B would have an equitable defense. It is analogous to a case where a creditor has recovered from a principal and sues a surety.

Suppose, on the other hand, C releases A, can he then sue B? This may well be a case of releasing a principal and thus freeing a surety. The answer to that is that they are not both bound by the same agreement. It is possible that the courts might take the view that B's agreement is to stand as surety on A's account. The law on this point is not settled, but conveyancers should take pains to avoid falling into this possible trap.

There seems no reason why, if C desires to release A, he may not do it, if, in the same agreement, he reserves all right against B, and especially if B consents to the release, he would still be bound. Otherwise, it would seem to be a dangerous proceeding.

611. **Intermediate grantors.**—Where there is a covenant of warranty given by A in a deed, and the land passes through various hands, each successive owner giving a covenant of warranty, this original covenant is annexed to the land and runs with it and binds not only heirs and executors, but assignees. An intermediate grantor does not become totally divested of the covenant by a grant of the land. By the conveyance of the estate the grantee becomes entitled as assignee to the benefit of the covenants annexed to the land against his grantor and all prior grantors, but this does not take away the right which his immediate grantor had to look to his grantor and all prior grantors for indemnity in case of a

breach of the covenant subsequent to the assignment for which he is liable to pay damages. So the assignee, on being compelled to pay damages for a breach of the covenant to a subsequent assignee, may maintain an action against his assignor. This proves that the contract continued in force and did not become extinguished by operation of the assignment.

612. **Same subject.**—A last assignee can never maintain an action under a covenant of warranty until he has been evicted, though the title may be defective. If it is defective, though he may be liable to be evicted, yet he can bring no action on the covenant until he is actually evicted, for till then there has been no breach of the covenant and no damage sustained. So the intermediate covenantees have no right of action against their covenantors till something has been done equivalent to an eviction, for until then they have sustained no damage. The last assignee has his election to sue all or any of the prior covenantors. As a recovery in satisfaction by an intermediate covenantee against the prior covenantor would not bar an action by a subsequent assignee, such intermediate assignee ought not to be allowed to sustain his action until he has satisfied the subsequent assignee. For, otherwise, every intermediate covenantee might sue the first covenantor. One suit would be no bar to another. They might all recover judgment and obtain satisfaction. So that a man might be liable to sundry suits for the same thing and be compelled to pay damages to different covenantees for the same breach of covenant.[19]

[19] Booth v. Starr, 1 Conn. 244.

613. **When covenant runs with land.**—The general English doctrine is that privity of estate exists for the running of covenants with the land only where there is the relation of landlord and tenant. On the other hand in this country the general rule is that in the absence of the relation of landlord and tenant there is privity of estate if the interest of one party in the other's land is an incorporeal hereditament. Some courts have gone beyond this by laying down the rule that a covenant contained in an instrument conveying the fee runs with the land if such is the intention of the parties and if the burden is one consistent with public policy. So where a deed conveyed land to a railroad company and the grantee covenanted to maintain a station on the land granted, the grantee of the railroad company was held bound by the covenant.[20] Where the doctrine is limited to covenants in the deed passing the estate with which the burden is to run, there seems no objection to it, as the covenant is on record and all subsequent purchasers have notice of it. The principle which applies to covenants for the use of lands applies to covenants for title, that the covenants run for the benefit of the grantees.

614. **Same subject.**—In England the burden of covenants runs with the land at law only in the case of leases, while in this country it is generally held that the burden will always run at law, provided there is in the first place privity of estate, in the second place that the covenant concerns the use or enjoyment or the value of the land. Our law in gen-

[20] Louisville H. & St. L. Railway Co. v. Baskett, 121 S. W. 957 (Ky.).

eral finds no privity of estate unless the covenant accompanies a grant. A good example of this rule will be found in a case recently decided in the state of Indiana.[21]

615. **Damages.**—Recovery in actions in covenants against incumbrances is limited to the amount paid to remove the incumbrance. This rule was adopted for the protection of the covenantor, for until full payment the liability of the covenantor would continue. So in case of a seller, the measure of damages is the purchase price and interest less expenses incurred in defending the title.[22]

The lessee in New York can recover nominal damages only for a breach of the covenant of quiet enjoyment with nothing for the value of the lease or improvements.[23] But the general rule is that the lessee can recover the value of the unexpired term, less the rent reserved.[24] Where the plaintiff, after paying off incumbrances on property conveyed, sued for breach of a covenant against incumbrances and the defendant set up a former recovery of nominal damages before the incumbrance had been satisfied, it was held that the former recovery is no bar to the present action.[25]

616. **Adverse possession as breach of covenant.**—A covenant of warranty is broken when a possession adverse to the grantor has ripened into an inde-

[21] Evansville, etc., Tract. Co. v. Evansville, etc., Railway Co., 44 Ind. App. 155, 87 N. E. 21.

[22] Cole v. Kimball, 52 Vt. 639, LEADING ILLUSTRATIVE CASES.

[23] Thorley v. Pabst Brewing Co., 179 Fed. 338.

[24] Riley v. Hale, 158 Mass. 240, 33 N. E. 491.

[25] Harsin v. Oman, 68 Wash. 281, 123 Pac. 1.

feasible right at the time the conveyance with the covenant of seisin is made. In a recent Minnesota case it did not appear, however, whether the adverse possession had ripened at the time of the covenant or not and the court held that there was a breach of the covenants where a third party prevailed by setting up possession for the statutory period.[26]

617. **Enforcement in equity.**—In this country the burden of all covenants that run at law will be enforced in equity, while in England equitable relief is confined to restrictive covenants. The ground of equity jurisdiction set forth has been preventing unjust enrichment, as the successor of the covenantor by buying land subject to a burden buys at a lower price and if he holds the land after the purchase free from the burden he is enriched by the enhancement in its value. This enrichment exists whether the burden be affirmative or negative, and, therefore, it would seem that the American courts were right in making no distinction between affirmative and negative covenants.

618. **Estoppel.**—Aside from the right of action for breach of covenant, the grantee has vested in him any after-acquired interest of the grantor by reason of the doctrine of estoppel. The grantor is estopped from setting up a superior title if he has not done so when it was his duty to do so, and his subsequent claim would be a breach of duty, so he is held bound by the title which he has previously affirmed.[27] If the grantor can buy up an outstanding claim, the

[26] Larson v. Goettl, 103 Minn. 272, 114 N. W. 840.
[27] Baxter v. Bradbury, 20 Me. 262.

doctrine of estoppel passes the title to the grantee so as to defeat an action for breach of covenant.

The doctrine of estoppel by deed has been treated as resulting from the effect given to the feudal warranty in avoiding circuity of action. The doctrine is in England probably restricted to leases, but in the United States it covers all classes of conveyances, even though the grantee's action on the covenant of warranty is barred or the truth as to the grantor's ownership appears on the face of the deed so that the doctrine cannot now be based on circuity of action or the principle of strict estoppel. It seems to be based today on the broadest equitable principles.

When the question arises between a grantor and a grantee, equity should adjust the questions according to the circumstances, for if the doctrine is an invariable rule of law the grantee may get the title, although he might prefer to recover for breach of warranty, and after a long delay his circumstances might have changed so that he might not desire the land for which he obtained a deed in the first place. Furthermore, land might depreciate in value, which would allow the grantor to purchase it at a reduced value and force title on the grantee, so that the grantor might reap an advantage from his own wrongdoing. A further extension of the rule results in great hardship to a purchaser in good faith from the original grantor, as the strict application of the rule would force him to discover at his peril whether any grantor in the chain of title ever purported to convey the land in question before his acquisition of it. He could not rely on the registry and the

grantor's apparent title. In equity, however, the courts will protect the bona fide purchaser who has searched the registry in the usual way and the grantee in the first conveyance will be left to his action on the covenants.[28] So where a debtor gave a warranty deed of land which he expected to inherit and against which there was a judgment lien, the court holds that the grantee took the land subject to the judgment lien. The question is troublesome and the rule is by no means settled.

619. **Title by estoppel.**—Estoppel may be caused by matter of record, by matter of deed, or by matter in pais, which is a legal expression meaning by matter outside of the record, as by overt acts. There are two classes of cases in which an estate passes by estoppel by deed. The first is where the conveyance at common law was made by feoffment, a fine or a common recovery. Such was their solemnity that these conveyances always passed some estate, and divested the grantor not only of what he had, but of every estate which he might thereafter by any possibility acquire. The second class of transactions were leases, and the estoppel here was put on the ground that such was the contract or agreement between the parties, especially as leases were capable of taking effect in the future. In England there was no estoppel in the case of a deed by bargain and sale of real estate. In this country the doctrine of estoppel by deed applies to all deeds, and is not limited, as at common law, to feoffments or warranty deeds.

[28] Wheeler v. Young, 76 Conn. 44, 55 Atl. 670.

620. **Feeding the estoppel.**—Suppose, at common law, A made feoffment to B of property which he did not own, and to which he had no title; and suppose, after he made the feoffment, he bought the property himself from the owner, he is then by his own feoffment estopped from denying that the feoffee has title to the property, and the title automatically passes to the original feoffee the instant the feoffor obtains it. This passing of title to the feoffee is what is known as "feeding the estoppel."

621. **Application of estoppel.**—The doctrine of feeding the estoppel, however, does not apply when the grantor, at the date of the original grant, has a lawful interest in the land, but less than the purported estate. The doctrine of estoppel may well work great hardships on later purchasers from the grantor. The rule now is, that an after-acquired title of whatever character will pass to the grantee when it was derived from the source that was warranted against.

The general doctrine is that there must be covenants in the deed to cause the doctrine of estoppel to arise. But it is also true that estoppel may survive personal liability in states where the view prevails that the estoppel should depend on the intent to be derived from the whole instrument regardless of the particular covenants. For example, where A gives a warranty deed of land which is really incumbered by a lien, and goes into bankruptcy and after the discharge he buys the land at the judgment sale, the estoppel is fed and the court holds that no existing or past personal liability is necessary to work an

estoppel, for where there are no covenants in the deed, the estoppel will still run.[29]

The general American doctrine is that the covenant runs only with the possession, but where A makes a warranty deed to B and A never had either title or possession, the estoppel takes place, although the grantee B has conveyed the property to C before he takes possession, as the covenant runs with the deed rather than merely with the possession.[30]

[29] Bush v. Cooper's Adm'r, 18 How. 82 (U. S.).
[30] Wead v. Larkin, 54 Ill. 489.

CHAPTER LV.

RECORDING LAWS.

622. **Recording laws purely statutory.**—In all of the states there are statutory provisions for the recording of deeds and mortgages and all other proceedings and instruments affecting the title to real estate. These statutes are purely local, but are substantially uniform in the various states. The object of these laws is to give the public notice of the condition of the title to lands, and the statutes which provide for recording declare that the recording shall be notice to everyone of all facts therein contained, and also that any deed or mortgage or other instrument affecting title to land, which has not been recorded as required by these statutes, shall be void as to a subsequent purchaser or incumbrancer in good faith and for a valuable consideration. In most of the states actual notice of the existence of a deed or mortgage is just as good as the constructive notice which arises from the proper recording of the instrument.[81]

623. **Where records kept and how entered.**—These records affecting title to lands are usually required to be kept at the county seat of the various counties in the state, and separate books are kept for deeds, mortgages and other instruments, as leases, execution levies, land contracts, and the like. The

[81] Rev. Stats. Ohio, § 4143; Morris v. Daniels, 35 Ohio St. 406.

statutes also provide that separate books be kept for the entry of deeds and mortgages for record before they are actually recorded, and they are effective from the moment of such entry for record. The entry book is a mere memorandum of the names of the parties, grantee and grantor, and that the instrument has been left for record, which is later copied at length in the regular record book of deeds or mortgages. The entry books show the day, hour and minute at which the instrument was left for record, the names of the grantor and grantee, the town, city or village where the lands conveyed are situated, as well as a sufficient description of the lands to enable any one to locate them. The deed or mortgage is then regarded as recorded, giving public notice to all of its contents, from the moment of this entry for record, or of its being left for record with the register or recorder for entry.[32] It is held that the entry in the preliminary register book of the names of the grantor and grantee and other facts necessary to be therein stated, will cure an omission of these facts when the deed or mortgage is recorded at length, as the abstracter is presumed to look at the entry book when the names are omitted in the record.[33]

The register is obliged simply to record what is on the face of the instrument, nothing else. Where there is no seal on the instrument and the statute requires one, the instrument is not entitled to record, and a memorandum that there was no seal at the

[32] See for example, Rev. Stats. Ohio, § 4133.
[33] Farmers' & Mechanics' Bank v. Bronson, 14 Mich. 361.

recording of the instrument will not aid the instrument. The record implies a seal, as the instrument is not entitled to record where it is absent. It should be indicated in the record with a scroll.[34]

Where the statute prescribes what formalities are necessary to the execution of a deed, as two witnesses under seal and the like, a failure to observe these requirements makes the instrument incapable of being recorded, and though recorded in fact it gives no notice to the public. The reason is that the provision for this constructive notice is purely statutory, and unless the requirements are observed the instrument not being entitled to record can give no notice. Although the object of recording laws is to give the public notice of the title to land, still the record under our statutes is not made exclusive notice so that actual notice may not be shown. A purchaser having no other notice than that of the record is entitled to rely upon it, if the instrument was entitled to record, as the statutes declare that every conveyance of real estate thereafter made which shall not be recorded shall be considered void or fraudulent against any subsequent purchaser in good faith and for a valuable consideration whose conveyance shall be first recorded.[35]

624. **Effect of mistake in record.**—A subsequent purchaser of land has the right to rely upon the records as showing the exact facts, unless he has received actual notice that the record is incorrect. In

[34] People v. Bunker, 128 Mich. 160, 87 N. W. 90.

[35] Pratt v. Pratt, 42 Mich. 174; Hooper v. Leavitt, 109 Me. 70, 82 Atl. 547, LEADING ILLUSTRATIVE CASES.

some states the person or persons procuring an instrument to be recorded are held responsible for all errors in the record, on the principle that the recording officer acts as an agent of such person or persons.[36] But this rule does not prevail in other states, where it is held that the register or recorder is a public officer and not the agent of any individual having an instrument recorded.[37] The purchaser is not charged with the contents of the deed or mortgage further than such contents are contained in the record. Thus it has been held that when a mortgage was recorded for less than its actual value, it was only notice to the amount stated in the record. And where the record omitted the name of one of the subscribing witnesses, the record was held to be no notice at all, because without the witnesses required by the statute the instrument was not entitled to record, and if not entitled to record the defective record was not a sufficient notice.[38]

In some states a different rule prevails and it is held that when a valid instrument is left for record, and the person leaving the instrument has complied with all the requirements of the statute, and by reason of an error of the recording officer the instrument as recorded is defective, the error thus made will not be chargeable to the person having the instrument recorded, and he is entitled to have the instrument give notice as it actually is and not according to the defective record.[39]

[36] Barnard v. Campau, 29 Mich. 162.
[37] Merrick v. Wallace, 19 Ill. 486; Mims v. Mims, 35 Ala. 23.
[38] Mower v. Stickney, 5 Minn. 397; Moran v. Palmer, 13 Mich. 367.
[39] Merrick v. Wallace, 19 Ill. 486; Mims v. Mims, 35 Ala. 23.

625. **Error in grantor's middle name.**—There is a common theory that the common law did not recognize a person's middle name, but there is no real authority for this view. In any legal situation where a person's name is of any importance, the middle name must be counted as part of his full name, although, of course, his identity may be otherwise established so that it may be unnecessary to use the middle name. Where, however, a mortgage was recorded with the middle initial of the mortgagor wrongly written, this is not constructive notice to a subsequent bona fide purchaser from the mortgagor.[40]

626. **Proof of title from records.**—Title to land may be proven from the records in two ways: 1. The records themselves may be brought into court and introduced in evidence, which is the usual way where the records are of easy access. 2. A certified copy of the records may be introduced with the same effect as the originals. But if any of the records are of instruments which are not so executed as to be entitled to record, they cannot be admitted and have no effect, so that the chain of title will fail, as, for instance, where the instrument has no seal, and one is required by the statutes.

627. **Subsequent purchaser's rights.**—The recording laws being for the protection of subsequent purchasers, by providing a method by which anyone may ascertain the true state of the title in any parcel of land, it is always held that the holder of a prior

[40] First National Bank v. Hacoda Company, 53 South. 802 (Ala.). See, also, Crouse v. Murphy, 140 Pa. St. 335, 21 Atl. 358.

unrecorded deed is defeated by the holder of a later deed procured in good faith and caused to be recorded before that of the other. But such subsequent purchaser, in order to be protected, must not only have no notice by virtue of the records, but must also be a bona fide purchaser for a valuable consideration, and without actual notice of the prior deed. The party relying on the older deed must show that the subsequent purchaser had actual notice of his claim.[41] Notice to the agent is notice to the principal in such cases.[42]

628. **A mortgagee is regarded as a purchaser under the recording laws.**—Within the meaning of all recording laws a mortgagee, or conditional owner, is regarded as a purchaser. At the common law a mortgagee was the owner of a conditional estate, that is, one liable to be defeated upon the happening of the event, or payment of the sum designated prior to the day fixed. At the present time the title to the mortgaged premises does not pass to the mortgagee by virtue of the mortgage deed, the mortgagee having simply a lien upon the land to satisfy or secure his loan. But, nevertheless, within the meaning of the recording laws the mortgagee is regarded as a purchaser, and has the same rights as against a subsequent purchaser as a grantee in a deed would have. In this regard some distinction is made between a mortgage given to secure a pre-existing debt, and one in which the consideration has been given at the time of the execution of the mortgage; the former

[41] Shortwell v. Harrison, 22 Mich. 410.
[42] Brushaber v. Stegemann, 22 Mich. 266.

not being regarded as a mortgage for value within the recording acts, while the latter is.[43] Where a mortgage is given and part of the money which it secures has been advanced to the mortgagor on the presumption that the title is good, and before the rest is paid the mortgagee receives notice of a prior title, he is not justified in making any further payments to the mortgagor; and if he does so his mortgage as to such further payments will be regarded as subsidiary to the title of which he has received notice.[44]

[43] Pancoast v. Duval, 26 N. J. Eq. 445; Williams v. Merritt, 23 Ill. 623.

[44] Dubois v. Campau, 24 Mich. 360; In re Washington Park Com'rs, 52 N. Y. 131.

CHAPTER LVI.

TORRENS SYSTEM OF LAND REGISTRATION.

629. **History.**—There is a form of recording statutes known as the Torrens Acts, which are bound to be more and more important in this country as time goes on. The Torrens system of land registration was originated by Sir Robert Torrens, and adopted in Australia, for the first time, in 1857. The first act of this nature, in this country, was passed in Illinois, in 1895, and was declared unconstitutional,[45] simply on the ground, however, that it conferred judicial powers on the registrar and examiners. But the legislature passed a statute in 1897 which was upheld by the court.[46]

630. **Constitutionality.**—The constitutionality of the statutes can no longer be questioned, as they have been sustained, although attacked on every possible sort of ground.[47] The commonest basis of attack is that they provide no notice to satisfy the requirement of "due process of law," especially to uncertain or unknown interests. The answer to that is that the proceeding is in rem, or as to property, and that the court has a right to dispose of the title to the res or property by summary proceedings in rem. Proceedings in rem were known to the early

[45] People v. Chase, 165 Ill. 527, 46 N. E. 454.

[46] People v. Simon, 176 Ill. 165, 52 N. E. 910.

[47] Peters v. Duluth, 119 Minn. 96, 137 N. W. 390, LEADING ILLUSTRATIVE CASES.

common law, as in case of a judgment in a writ of right, or a fine with proclamations, and the constitutions of this country were drafted with no intention to put an end to the possibility of these ancient institutions. A proceeding in rem at common law might give a clear title without other notice than a seizure of the property in dispute and exhibition of the warrant to those in charge. Even the requirement of advertisement in the admiralty cases is due only to the rules of the court and not to the common law.

Looked at from the point of view of history and from the requirements of justice, a proceeding in rem, dealing with a tangible res, may be instituted and carried to judgment without personal service upon the claimants within the state, or notice by name to those outside of it. Jurisdiction is secured by the power of the court over the res. A judgment of escheat, for example, where notice is given only by advertisement, will be sustained.[48]

631. **Purpose and effect.**—The policy of these statutes is to prevent stale claims, to stop claims based on uncertainty, and, in general, to increase the value of land by making its title marketable and certain wherever it was before uncertain. The purpose of these statutes is to have each piece of land so registered in its title that there can be no dispute whatever as to the state of the title. Where the acts have been adopted they have furthermore obviated the necessity of making a new and expensive examination of title at every conveyance. The result of the acts practically is that a landowner can go to

[48] Hamilton v. Brown, 161 U. S. 256.

the appropriate court and have his title registered and receive in return what amounts to a certificate by the state of his title.

632. **Operation.**—The practical operation of the statute is this,—that the landowner files a petition in the proper court, asking that his title be registered. The court then appoints a disinterested person, skilled in the examination of land titles, who examines the title, acting in such examination, in some states, as a Master in Chancery.[49] The examiner reports, giving the exact state of the title, with abstracts of all conveyances as far back as may appear material, and notes especially any possible defects in the title, and all persons who appear to have any possible interest in the land beyond the petitioner. A notice is then issued by the court to the parties named by the examiner as possibly interested, and a further notice is published to all the world. If on the return day of the notice any parties appear who desire a hearing, the court then grants a hearing in the usual way and with the usual rights of exceptions and appeal; and at the conclusion of the proceedings the court enters a judgment, either finding that the petitioner has no title, or if the court finds in favor of the petitioner a judgment issues stating just what title the petitioner has and to what incumbrances and liens it is subject. The court should require that the land be carefully surveyed before the certificate is issued and marked by appropriate monuments on the land.

633. **When useful.**—Where the title is a simple

[49] Gage v. Consumers' Electric Light Co., 194 Ill. 30.

one and the land is of small value, the conveyancer may well find it unnecessary to register the title to the land; but where the title is complicated or involved in any doubt whatever, the advantages of registration are apparent. Frequent use of this system is made where title depends in whole or in part on prescription, or there are prescriptive rights claimed over it of such a nature that the purchaser may well hesitate to accept the title. This proceeding forms an inexpensive and certain method of settling all such questions for all time and as to all the world.

634. **Power of court over defective titles.**—The court in this proceeding cannot, as is often supposed by the layman, register a defective title. The court has a right only to find what the petitioner's title is and crystallize that in the form of a certificate issued by the court showing exactly what land he has and what his title to that land is. This principle was well set out in a recent Massachusetts case as follows:

"It is contrary alike to principle, policy and practice under the Land Registration Act that a bad or defective or incomplete title should be brought into the registration court and decreed to be good. Defects of record, not defects of title, are curable here. On the other hand, it is one of the purposes of the registration law that the real title should be adjudicated upon, established, and made a matter of record."[50]

[50] Davis, J., In re Browning, Massachusetts Land Court Decisions, pp. 5, 6.

635. **Typical case for registration.**—To take a concrete case which was decided recently. There was a title presented to the court some years ago in New England with this situation: The land in question sought to be registered and the adjoining land were formerly united in one owner, A, who died in the eighteenth century. His title originated in a vote of the proprietors of the common lands of the town. A died intestate, leaving a widow and five children, and owning various tracts of land in the town. There were sundry deeds from the various heirs, in the early part of the nineteenth century, but no partition of the remaining lands among the heirs could be found. It appeared, however, that the grantors had for upwards of sixty years actually held their land in severalty, and the petitioner's land had been fenced off from the other land originally belonging to A. The question, a very difficult one, was as to whether any title by prescription in the case of tenants in common could be presumed or claimed. But the court was able on all the facts to find that a partition actually took place among the heirs by some lost agreement, and that the title of the petitioner was therefore good; and the petitioner received a certificate of good title which no power can question. This is a result that could hardly have been accomplished in any other way, and which was to the manifest advantage of all parties, as it made the land of all marketable.

CHAPTER LVII.

DEDICATION.

636. **Nature and form.**—The doctrine of dedication was adopted and developed within the last two hundred years because the theories of easements in aid of public or quasi-public rights were found inadequate. Dedication is of the nature of a gift, inuring to the benefit of the public as a grant, and takes place where in some form the landowner turns his land over to the use of the public. A dedication is a devotion to public use of land, or an easement in land by any unequivocal act of the owner of the fee manifesting such clear intention, and commonly takes place by the filing of a plan showing the streets laid out on it.[51] It takes place usually by deed, but that is not necessary. Dedication has never been held to be within the Statute of Frauds.

It is essential to the validity of a dedication that it should be made by the owner of the fee, or one having an interest in the land; that it should be for the use of the public and that it should be accepted by the public, either formally, or practically by use. It is not necessary that the fee should pass, as in public highways the public obtains merely an easement, for at common law the dedication and acceptance of a highway vested only an easement. The

[51] Douglass v. Belknap Springs Land Co., 76 N. H. 254, 81 Atl. 1086, LEADING ILLUSTRATIVE CASES.

dedication does not rest on the time of possession; all that is required is the assent of the owner and the fact that it is used for public purposes as intended by the owner. So a public highway as well as a private easement may be acquired by prescription. A public easement is in the nature of an easement in gross vested in the public, and there is no dominant tenement.

637. **Principles.**—The principles upon which the doctrine of dedication rests are peculiar. Dedication does not take place upon the theory that there has been a grant, for it may take place where there is no grantee in being to take at the time of dedication. The theory is that the land or the easement is given up unreservedly to the public for the public use and benefit. As no grantee or body politic is necessary to accept the dedication immediately, it follows that it may be a dedication designed by the owner to be accepted by the public now or in the future. The character and scope of the dedication depend upon the intention of the dedicator which has been expressly manifested or may be gathered from all the circumstances of the case.

638. **For what time.**—It seems to be fundamental to the idea of dedication that it must be perpetual. There is no case in which an attempted dedication by a tenant for years has been sustained, although it seems conceivable that the dedication might be sustained for the period of the lease. The rules of prescription would seem not to be applicable, as dedication is by gift and not by adverse possession. The principal objection to a terminable dedication is that

it would frequently embarrass the public which had relied on the continuance of the dedication, and that a terminable dedication would be against public policy. The question whether a life tenant can make a dedication has been suggested but it has never been settled in this country.[52]

639. **For what purposes.**—Two questions naturally arise in case of dedication: First, to what uses the land may be dedicated. Second, how is the dedication completed—when does the title vest in the public? In England dedication of highways only could take place, but in America the doctrine was early extended to parks, and to other public places. The doctrine of dedication has been held in New York not to apply to a public landing place,[53] but in other states it has been so extended.[54] The doctrine has been extended to burial grounds[55] and to land for public schools,[56] and not to railroad stations.[57]

640. **Conditional or limited dedication.**—It seems settled that there may be a qualified or conditional dedication, as it appears that a right of way may be granted by the owner subject to the right in the owner periodically to plough up the soil. And if the public accepts the dedication on these terms, it is bound by them.[58] Although the dedication may be thus conditional or qualified, it may not be granted

[52] Vanatta v. Jones, 42 N. J. Law 561; Attorney General v. Biphosphated Guano Co., L. R. 11 Ch. 327 (Eng.).

[53] Pearsall v. Post, 20 Wend. 111, 22 Wend. 425 (N. Y.).

[54] Godfrey v. Alton, 12 Ill. 29.

[55] Pierce v. Spafford, 53 Vt. 394.

[56] Carpenteria School Dist. v. Heath, 56 Cal. 478.

[57] Todd v. Pittsburgh Railroad Co., 19 Ohio St. 514.

[58] Mercer v. Woodgate, L. R. 5 Q. B. (Eng.).

only to a limited part of the public. At common law a dedication must be to the whole public, otherwise it is void. Yet, in this country, it is well settled that a dedication to charitable and religious uses only may be valid.[59]

641. **Acceptance.**—No distinct act of adoption on the part of the public is necessary to accomplish a dedication.[60] So, if a landowner throws a road open to the public, and the public uses it, it is then a public road, and the public is responsible for its maintenance, even although there never has been any distinct act of acceptance by the public. It is, of course, a question of fact whether the use made of the land is a public use. Where the result of the dedication is to charge the town with repairs, it is sometimes held that express adoption by the town authorities is necessary, but it is the usual view that this adoption may be inferred from the repairing or lighting of the streets, or from the continued use by the public.

In England the assent of the inhabitants was formerly necessary to give validity to a dedication, but more recently the law has there been held otherwise.[61] In this country, the weight of authority is in favor of the necessity of acceptance to render the corporation liable in case a road dedicated and accepted should become out of repair. It was held in a leading Maine case[62] that the mere act of a high-

[59] Beatty v. Kurtz, 2 Pet. 566 (U. S.).

[60] Ellis v. Hazelhurst, 138 Ga. 181, 75 S. E. 99, LEADING ILLUSTRATIVE CASES.

[61] Rex v. Leake, 5 B. & Ad. 469 (Eng.).

[62] Los Angeles Cemetery Assn. v. Los Angeles, 103 Cal. 461, 37 Pac. 375.

way surveyor was insufficient to accept a way which had been dedicated to the public. It is hard to say what is acceptance when the only evidence is user by the public. The user need not be as long as the statutory period, so in one case four years was held sufficient.[63]

642. **Same subject.**—It may be laid down as a general principle that the user must have continued so long that public rights would be materially affected by an interruption of the use. The presumption of acceptance by user is commonly avoided in this country by the erection of signs having on them the words "Private Way"—"Dangerous Passing." A highway may well be different from a park, for the presumption as to the acceptance of a highway is less than in the case of a park. Slighter evidence of acceptance is needed where the purpose is purely beneficial.[64]

[63] State v. Bradbury, 40 Me. 154.
[64] Abbott v. Cottage City, 143 Mass. 521.

CHAPTER LVIII.

PUBLIC LANDS.

643. **Survey of the public lands.**—When the public land system was adopted by Congress, the federal statutes provided for official surveys by skilled official surveyors assigned to the duty of subdividing the public land and locating boundaries. It was directed that two lines be run through the particular territory to be surveyed, one called the base line and the other the meridian line, the base line running from east to west, and the meridian line from north to south and intersecting the base line at right angles. After the base and meridian lines are run, the townships are surveyed, beginning at the intersection of the base and meridian lines. The townships are numbered with reference to the base line and meridian line. The first township that touches the base line on the north and the meridian on the west would be township one north, range one west, a range being a group of townships in a survey. Townships are numbered from the base line north and south, and from the meridian line east and west. So that if the number of the township is given and you know the location of the base line, the location of the township may easily be found.

After the territory has been surveyed into townships six miles square, each township is subdivided into sections containing six hundred and forty acres;

these sections are numbered consecutively from one to thirty-six, commencing in the northeast corner of the township and numbering back and forth so that number seven falls under number six, and number twelve under number one, and so on, number thirty-six falling in the southeast corner of the township. The sections are again divided into equal parts by running lines through the center north and south and east and west, a stone or other monument being placed in the center of the section and at each of the corners and at each of the quarter lines. The outside lines are called section lines, and the cross lines are designated quarter-section lines. These are the only lines actually run by the surveyors, though the quarter sections may be again divided.

When a plat of the survey is made in the Surveyor General's office, each quarter section is again divided into four equal parts by drawing lines through the center north and south and east and west. The quarter sections, containing one hundred and sixty acres each, are designated the northeast quarter, the southeast quarter, the northwest quarter and the southwest quarter of each particular section, and the divisions of the quarter sections are likewise designated as such parts of the quarter section. So that the full description of a forty-acre strip might be, for example, "The Northeast Quarter of the Northeast Quarter of Section 1, Township 5 North, Range 1 East of the Third Principal Meridian."

This general survey of the government lands was not adopted by a number of states, the lands simply being sold as so many acres in the unsurveyed por-

tion of the government territory, and then a surveyor was allowed to go and locate that number of acres; as a result the various lines frequently overlapped and created many disputes as to boundaries.

The land department of the government was first established in 1812. At first it was under the supervision of the Treasury Department, but was later transferred to the Department of the Interior, where it has since remained. The head of the department is called the Commissioner of the General Land Office, who acts under the direction of the Secretary of the Interior.

644. **Fractional sections.**—When the survey of the public lands was made, if the land was open prairie, the sections would, of course, be full ones. If the lines ran into a lake, the township lines would be run up to the lake and then meandered along the shore. As a result of this there would be fractional portions of sections on both sides of the lake. These fractional sections are surveyed and sold as so many acres of hard land, and no part of the water is included.

A rule of the General Land Office requires that in case any quarter section contains less than one hundred and sixty acres it shall be sold as an entire parcel. If it contains more than one hundred and sixty acres it shall be subdivided into parcels, and so offered for sale. When a quarter is less than one hundred and sixty acres a portion of another quarter may be included in the survey. Thus if a meandered lake divides a section so that a portion of the S. W. quarter is less than one hundred and

sixty acres, the survey may include a portion of the S. E. quarter.

If a stream is not meandered the bed is treated as so much hard land and does not affect the survey.[65]

When land is sold by the government, the land being designated as the "west half" or the "north half" of a section or quarter section, then the parcel west or north of the center line is conveyed without reference to whether it contains one-half the land in the section or not. It may contain two-thirds of the land in the section or less than one-third, but the grantee takes all the land on the designated side of the center line as run by the surveyors, be the same more or less.

But if the deed is between private persons and describes the land as the north or south half without reference to the government survey, the line dividing the parcel into equal parts would be the boundary line.[66]

In running lines north and south the lines approach each other towards the north on account of the earth being round. Hence in measuring a township six miles on the south boundary and running directly north the northern boundary will be shorter. The result is that the sections in a township cannot be exactly a mile square, and do not all contain six hundred and forty acres. The question then arises as to where these fractional sections fall. In correcting the errors thus caused number thirty-six is made a full section, and likewise all the others until

[65] Wilson v. Hoffman, 70 Mich. 552; Brown's Lessee v. Clements, 3 How. 650 (U. S.); Gazzam v. Phillips, 20 How. 372 (U. S.).

[66] Same.

the west boundary line of the township is reached; and the sections on the west boundary are larger or smaller in their dimensions to make up the difference. In like manner all the difference in the north and south dimensions is corrected in the northern line of the sections. So that almost every section on the west and north of the townships in a government survey is a fractional section, and the fraction is made to fall on the north or west side of the subdivision. That is, the surveyor commences on the southeast corner and makes the shortage or surplus to fall on the north or west tier of sections, so that all sections are full except on the north and west sides of the township.

645. **Rights of riparian owners.**—When the government sells land bordering on a river, or fresh water stream, the several riparian owners have a right to use the water in common for all ordinary purposes. If it is a lake or stream of considerable size and irregular shape the right to use any particular portion of the water for a special purpose, as cutting ice, will have to be fixed and determined by a partition suit in equity. In ordinary cases where the lake or stream is small, each riparian owner has the right to cut ice on that portion of the water bounded by the center line of the water and a line drawn from the point where the boundary line of his land touches the water at right angles with the center line, or within the section lines projected into the lake.[67]

[67] Jones v. Pashby, 62 Mich. 614; Grand Rapids Ice & Coal Co. v. South Grand Rapids Ice & Coal Co., 102 Mich. 227.

646. **Sale of public lands.**—The public lands are divided into land districts and in each of these a public land office is established. The officers of the land office are a Register and Receiver. The lands must first be offered at public sale, and sold to the highest bidder, provided the bid is equal to the minimum price fixed by the government. The original price was $1.25 an acre, except where land bordering on railroads was offered for sale. On the purchase of one of these parcels of land the price is paid to the Receiver of the local land office who issues a certificate of purchase. This certificate entitles the purchaser to a deed or patent to the land from the government, but it is first sent on to the general office at Washington, where the records are examined to ascertain if any mistake has been made. If no errors are detected a deed or patent is issued, signed by the President and the Register of the Land Office, and is recorded at Washington and is then sent to the local land office to be there placed on file. This deed from the government is called a patent, this being the term used by the English government for grants of land made by the crown to private individuals. The title to the land purchased does not vest in the purchaser until the patent has been recorded. In this a patent differs from a deed, as delivery is essential to passing title by deed, but recording of the patent is sufficient to pass title by patent.[68]

647. **Same subject—Governmental grants for educational purposes.**—The United States Govern-

[68] United States v. Schurz, 102 U. S. 378.

ment has made various grants to the various states of public lands for educational purposes. Thus, in the North West Territory the sixteenth section in every township was given for educational purposes. Grants have likewise been made for the benefit of universities and colleges. And sometimes the states have been given large tracts of swamp land in order to have them drained and cultivated. In the various purchases made by the United States, as Florida from Spain, Louisiana from France, and the recent acquisition of Porto Rico and the Philippine Islands, the treaties made provided that the rights of the private owners of the property in the territory acquired should be respected and confirmed by the United States.

CHAPTER LIX.

POWERS.

648. **Definition.**—A power is an authority conferred upon one person to dispose of property vesting in himself or in another person. A power has also been defined as a power of disposition over property, given to a person not seized, by someone who directs the mode by which that power shall be exercised by particular instrument. No set form of words is necessary to create a power.

649. **Terminology.**—The person who creates the power is properly called the donor of the power. The person upon whom the power is conferred is the donee. And the person in whose favor it is executed is the appointee. A general power is one which enables the donee to appoint to anyone he pleases, including himself, while a special or particular power is one restricting the donee to an appointment among particular objects only.

A power may be appendant or appurtenant where its execution is to operate to some extent out of an estate vested in the donee. A power in gross is where the donee has an interest in the subject matter of the power, but the estate to be created cannot arise until after the termination of the donee's estate. A collateral or naked power is where the donee has no interest or estate in the subject matter. A power coupled with an interest is where

the donee has an interest in the subject matter of the power, but it is not enough that he has an interest in that which is produced by the exercise of the power. Suppose there is a power to D for life, remainder as D shall by will appoint, and in default of appointment to R in fee. Here D has an estate and also a power, but the exercise of the power cannot in any way interfere with his estate. This is what is known as a power in gross or collateral.

650. **Exclusive power.**—An exclusive power is where the donee is given a right to appoint to one or more of certain appointees exclusive of others. Proper language for an exclusive power would be "to such one or more of them exclusive of the others." It will be presumed in the absence of proper language, that the power is non-exclusive, where there is nothing to indicate the contrary. Suppose there is a power to appoint A, B, C, D, and E, in such shares as the donee may elect. There is no obligation on the donee of the power to appoint at any particular time and when he does appoint he need appoint only to those appointees living at the time. Non-exclusiveness does not apply to the executor of a deceased person. In fact, the donee would have no right to give to the representative of a deceased appointee.

651. **Effect of Statute of Uses.**—Under the Statute of Uses property may be given to A and his heirs to the use of such as X may appoint, and the operation is the same as though the beneficiaries were named in the instrument. Such language was necessary at common law in case of a deed, but in a will

there is no need of employing the Statute of Uses. So a gift may be made by will to A for life and on his death as he shall, by will, appoint. And the appointee takes as if he had originally been named in the will.

652. **Exercise must be in accordance with power.** —It may be said in general that a power must be exercised in exact compliance with the terms of the instrument creating it. A power to appoint by will cannot be exercised by deed and the attempted exercise by deed will not be aided in equity as a defective execution of power.[69]

653. **Who may exercise power.**—Suppose a power is given to A, B, and C, and C dies. If the power is given by name to three, it can be exercised only by all three together. On the other hand, where the power is given to executors, the survivor may use it. When a power is given to executors it should be given to them and survivor, and the testator should consider whether he wants the administrator cum testamento annexo to exercise it, as the power will not usually pass to him unless it is expressly given. (The administrator cum testamento annexo is the administrator appointed in case the executor cannot serve for any reason, or if he dies.)

654. **Exercise by gift in will.**—The English rule seems to be that a gift in general terms in a will will not be an execution of a power without other evidence of that being the intention of the testator. The distinction relied on in England is between

[69] Reid v. Shergold, 10 Ves. 370, 380 (Eng.).

power and property, and it has been repeatedly said that a power is not property and will not pass under a general gift of property in a will. The English rule has been followed in many courts in this country. It has been stated as follows: In respect to the execution of a power there must be a reference to the subject of it, or to the power itself; unless it be in a case in which the will would be inoperative without the aid of the power, and the intention to execute the power became clear and manifest.

It has been said there are three classes of cases where the execution of a power was intended: first, where there is some reference in the will, or other instrument, to the power; second, a reference to the property which is the subject on which it is to be executed; third, where the provision in the will would otherwise be ineffectual or a mere nullity. There is a doctrine in this country that the only question is the intention of the testator and that general words may be sufficient without any of these further indications to show that the exercise of the power was intended.[70]

It may be proper to provide in the power, to prevent its going unnoticed, words like these: "This power is not to be exercised by general words, but only by specific reference to it."

The Massachusetts rule is that there must be an express provision in the will to exclude a power from passing as property.

655. **Same subject.**—Suppose the testator gives

[70] Amory v. Meredith, 7 Allen 397 (Mass.).

his residue in a certain way and does not profess to use any power; in fact, he did not have any power at the time he made his will. Then, subsequently, property is settled on the sister of the testator for life and on her death as the testator may appoint, and he dies without exercising his power. Here the donee had no interest and so would not think of the power as his property, as he would if he were a life tenant. This makes some difference as to the question of intention. In most cases yet decided where the power has been held to be exercised in general words the donee was a life tenant.

656. **Same subject.**—The rule may be stated as follows: if there is a gift by will the bequest will not be considered an exercise of the power unless it is meaningless otherwise. If the donee of the power has lands of his own, it is not an exercise of the power; but if he has no land of his own it is an exercise of the power. On the other hand, in Massachusetts by judicial legislation, and in other states by statute, the bequest may be considered an exercise of the power even if the donee has land of his own. The attorney should inquire of his client concerning the existence of powers and an expression should always be inserted in a will where there is a power, "including all property over which I may have the power of appointment."

657. **Excessive execution.**—Where there is a complete execution of a power of appointment and something further is added beyond the authority of the donee, the execution may be good to the extent authorized and only the excess will be held invalid,

in case the excess may be separated by the court from the valid exercise of the power. Where the power is exceeded in the execution, in order to reject the excess and let the appointment stand, the court must see what the person executing the power had in view and must be satisfied that if he rightly understood the extent of his power he would have executed it. So where a power is executed to the proper objects but an invalid condition is annexed to it, the power may stand and the condition be stricken off as invalid.

658. **Non-exclusive power.**—Where no discretion is given under a will to appoint, but a power is to be exercised for a definite class with no power of exclusion, and members of that class are excluded, equity always distributes equally to the entire class. Where there has been an attempt to appoint too much the last appointees lose their share. In a recent case, however, where there was property bequeathed to A to appoint "four thousand dollars to my mother's family and the balance to my father's family in such manner as he thinks proper," and the donee of the power appointed forty-five hundred dollars to his mother's family, the court holds that the appointment is void and the court cannot appoint the property.[71]

659. **Defective execution.**—If a man has executed a power improperly, as where he executes it in a will which has not enough witnesses, there is no remedy at law. Still, there may be a remedy in equity for a wife who is thus omitted. This is in

[71] In re Rogers' Estate, 218 Pa. St. 431, 67 Atl. 762.

the nature of an anomaly in law, as it is not a general doctrine that equity will enforce a meritorious consideration not enforcible at law. Under this doctrine, however, if the appointee has given consideration of any kind for the appointment, or if the donee has covenanted for good consideration to make the appointment, it may be upheld as in case of a relative of so close a relationship that consideration may be implied.[72]

660. **Illusory appointment.**—An illusory appointment occurs where a donee has a non-exclusive power, but where he exercises the power by appointing a merely nominal share of the estate to some of the appointees and gives substantial amounts to others. The doctrine is more prevalent in England than in this country. An illusory appointment has been held there to be a fraud on the power. It is very hard to say what is a substantial share of the property.

661. **Fraudulent appointment.**—A power to appoint is not a technical trust, it is true, because the possible beneficiary has not the capacity to call for its execution. But it has never been doubted that such a function is a confidence and as such cannot be made the subject of barter. The principle is established that donees shall gain no profit by force of their position, for if it be lawful for them to bargain for their own personal advantage, it is obvious that in many cases the bulk of the property would inure to the benefit of the donees themselves. So

[72] Coates v. Lunt, 210 Mass. 314, 96 N. E. 685, LEADING ILLUSTRATIVE CASES.

any appointment to further the selfish interest of the donee of the power will not stand, as such an appointment is held to show constructive bad faith towards the donor of the power. So any gainful agreement to refrain altogether from the exercise of the power is necessarily equally fraudulent, as it involves also a constructive fraud.[73]

662. **Same subject.**—If X has the power to appoint A, B, C, D and his children, and if X appoints the whole to B on condition that B will give back half, this appointment will be set aside as being opposed to the intention of the donor. The courts will not, however, go into the question of the reasonableness of the appointment and will not upset it on account of any whimsical reason in the donee. The only ground of attacking it is that there is some pecuniary advantage in the donee. This doctrine of fraudulent execution applies only to a special power. So if the donee of a special power exercises it in bad faith with the intention of benefiting persons who are not the objects of the power, the exercise may be declared fraudulent.[74] On the other hand, a bargain with an appointee that he will, in case the power is executed in his favor, give a portion of his share to another appointee, is not a fraud on the power. So where a father who had a power to appoint to his children, appointed to one who was dying, the execution of the power may be held invalid as being without any intention to benefit the appointee but to benefit the donee as the heir

[73] Thomson's Exrs. v. Norris, 20 N. J. Eq. 489.
[74] Degman v. Degman, 98 Ky. 717.

of the dying child.[75] In such case the exercise of a power to an infant is not invalid merely because of the chance that the infant may die and leave the donee the heir, while, on the other hand, it is not necessary that the appointee should share in the fraudulent intent or arrangement of the donee.

663. **Abatement of power.**—Where successive appointments are made they will have priority in the order in which they are made and where the first appointments exhaust the fund, there may be an abatement of the later appointments.

664. **Lapse of power.**—The power may lapse where the appointee is incapable of taking, as where the appointee dies before the appointment takes effect, and there may be a resulting trust in favor of the estate of the donee. In case the donee appoints the entire subject matter on appointments which do not exhaust the fund, the surplus may fall back to the donee and not pass as unappointed.[76]

665. **Release of power in general.**—A power may be extinguished in two ways: either by a formal release of the power, or by valid conveyance of the property over which the power exists. Where the donee of the power also has a fee, it is clear that a man's right over his own property cannot be interfered with by giving him a power, and if he cannot dispose of his property his rights over it are interfered with. General powers in gross, exercisable by either deed or will, can be released, and the release of such a power is equivalent to an appoint-

[75] Wellesley v. Mornington, 2 K. & J. 143 (Eng.).
[76] Lefevre v. Freeland, 24 Beav. 403 (Eng.).

ment. So any dealing with the estate by the donee of the power inconsistent with its exercise, by which the rights of others are affected, puts an end to the power.[77]

666. **Release of power appendant.**—A power appendant may be extinguished by a conveyance in fee before an appointment is made. So a testator devised property to trustees for the use of A for life and on her death to such charities as B might elect, and in default of such election the income to be paid to B for life and on her death to certain associations. Where A and B and the trustees under the will and the officers of the associations specified joined in a conveyance the power appendant was extinguished.[78]

Suppose property is left as D shall appoint, and in default of appointment to D in fee. There D has the life estate and also a full power. This is common where the property is given to a man who is about to marry and the donor desires to exclude his wife from dower, as under this power he has the right to settle the property on trustees, although the wife would take dower if the power was not used. If D uses the power it is at the expense of his own estate. So it was called a power appendant. If it is a general power to such persons as D shall appoint and in default to D in fee, if D conveys the land to B and then tries to use the power, he has estopped himself by his grant from using the power. On the

[77] Langley v. Conlan, 212 Mass. 135, 98 N. E. 1064, LEADING ILLUSTRATIVE CASES.

[78] McFall v. Kirkpatrick, 236 Ill. 281, 86 N. E. 139.

other hand, if the donee has only a special power of appointment and he purports to convey the fee which he has and then tries to use the power, the appointees have no claim and he cannot use the power even though it is special if it is appendant, so that in this case D can convey the fee and estop himself from using the power whether his power is general or special. It has been held in England that bankruptcy extinguishes a power appendant.[79]

667. **Release of power in gross.**—Suppose there is a conveyance by D to T in fee, and power in D to revoke and make a new appointment; instead of a legal interest in the land, the donee here has a power to set aside the conveyance and it is called a power collateral or in gross. This is a power reserved by the grantor, is an interest in him and may be released or extinguished by him, whether it is general or special. Suppose there is a power to A for life and on A's death as D shall appoint. This is simply collateral. Suppose the power is general, there is no reason why D cannot release it.

But if, on the other hand, the power is special, the donee has no right to release it. Suppose, for example, the remainder is in D's children, as D shall appoint. D cannot release it, for if D should fail to exercise the power, it would pass to A's children equally. It is really a trust in D and the court would carry it out if D failed to do so.

668. **Extinguishment of special power in gross.**—The question arises whether a special power in gross can be released. Suppose there is a gift to

[79] Doe v. Brittain, 2 B. & Ald. 93 (Eng.).

A for life, on his death as he shall by deed or will appoint to his children or grandchildren, and in default of appointment, to his children. Here A has a power in gross. While, suppose there is a gift to A for life, on his death as B shall appoint by deed or will to A's children or grandchildren, and in default of appointment, to the children of A. Here B has a power simply collateral. In both cases there is a life estate and remainder, and in neither case does the exercise of the power affect the life estate. It would seem that the circumstance that in the first case A has an interest in the property, while in the second case B has no interest is immaterial, as the exercise of the power cannot affect A's interest in either event. The English law, however, has not followed this reasoning on account of their theory of tortious conveyances,[80] explained in the next section, and there they have established the doctrine that a special power in gross can be released by the donee.

669. **Same subject—Tortious conveyances.**—It has been laid down as a broad, general proposition that while powers appendant and powers in gross or collateral may be extinguished, a power simply collateral may not be. The theory is supported on the idea that in the first two cases, since the donee has himself an interest he may extinguish this interest. But, in the third case, since he has no personal interest in the exercise of the power, he may not extinguish it to the detriment of others.

Where a power in gross is general, the donee has

[80] Horner v. Swann, T. & R. 430 (Eng.).

an interest in its exercise, for he may appoint to himself. But when the power is special the donee may not appoint, except among a specified class, and he has no personal interest in the appointment. Therefore, if the test of the right to extinguish the power is the donee's interest he should not be allowed to extinguish a special power in gross. The early English cases where the power in gross has been held extinguished by a conveyance, rest on the English theory of tortious feoffment, that, although the donee could not lawfully convey an estate greater than he owned, yet he could so convey tortiously, and should not, by exercising his power subsequently, be allowed to derogate from his own grant. But today all conveyances are innocent and carry only what the grantor gave, so that this reasoning from tortious feoffment has no place. The American tendency appears to be to hold that such powers are not extinguishable. See, for example, McFall v. Kirkpatrick,[81] where a marriage settlement gave a general power of appointment by will to the life tenant and the property in default of appointment to her heirs and assigns, and the life tenant conveyed a fee to the defendant, and subsequently appointed by will to the plaintiff. The court decides that the life tenant takes an equitable fee under the rule in Shelley's Case, and that the power is consequently a power appendant, and is, therefore, extinguished by the conveyance in fee. The case rests on the point that the donee had an equitable fee.[82]

[81] 236 Ill. 281, 86 N. E. 139.
[82] Same.

There is a dissenting opinion holding that the donee had only a life estate and consequently the power to appoint by will, as a power in gross, was not extinguished by the conveyance in fee, as such conveyance only operated on her life interest.

670. **Same subject—Special powers in gross.**—Professor Gray submits the true doctrine as to special powers in gross as follows: "If the person to whom an exclusive power is released is an object of a power, the release is good, because it is in truth an appointment; but just as an appointment made to benefit the donee is a fraud on the power, so a release to an object of the power made to benefit the donee is a fraud on the power.[83] If the person to whom the power is released is not an object of the power, as when a life tenant has a power to appoint to his children, but the gift in default of appointment is to B and the release is made to B, then in a jurisdiction which is not bound by English precedent such a release should be considered invalid."[84]

671. **Extinguishment of power to appoint by will.**—It would seem that if a donee's power to appoint by will is to remain ambulatory he cannot debar himself from changing his mind not to exercise it, but the law in England seems otherwise. There the donee can release her testamentary power[85] by covenants. It is settled in England that a covenant to exercise a testamentary power in gross is of no

[83] Thomson's Ex'rs v. Norris, 20 N. J. Eq. 489.
[84] 24 Harvard Law Review 563.
[85] In re Evered, 1910, 2 Ch. (C. A.) 147 (Eng.).

effect, even in equity, as an exercise of the power, but that even apart from statute a testamentary power in gross can be released by a covenant or other act inter vivos. The English precedents have been followed in Kentucky[86] and in Rhode Island.[87]

It is suggested by Professor Gray that the broad principles of equity require the doctrine should not be adopted in other jurisdictions.[88]

[86] Columbia Trust Co. v. Christopher, 133 Ky. 335.
[87] Grosvenor v. Bowen, 15 R. I. 549.
[88] 24 Harvard Law Review 533.

B. DURING LIFE WITHOUT CONSENT OF OWNER

CHAPTER LX.

IN GENERAL.

672. **Original acquisition.**—All title to real estate on this earth rests in the last analysis on occupation. So on any uninhabited portion of the globe at the present time title may be obtained in this way. When the city of Boston, for example, was founded by the Puritan settlers, they found there a man named Blackstone, who was already in occupation, and they took a deed from him, and this deed is the foundation of much of the title to the property in the city of Boston today. Good titles may well exist founded on occupation which do not appear of record anywhere. A man who is in actual possession of land under a claim of ownership where there is no one who can lawfully dispute his right to hold it, has every essential element of title under our law. The old Anglo-Saxon theory, or rather fact of seisin, was a fundamental principle of the common law and is none the less a living part of the real estate law of today, although through the daily practice of conveyancers it has become obscured by the intricacies of our record titles. It is the right to immediate possession, not the ultimate determination of true ownership with which the common

law is concerned. The only proper question for the conveyancer should be, What is there of record to interfere successfully with the person now in possession and claiming title?[89] This test is often overlooked by the conveyancer.

673. **Eminent domain.**—Another method of transfer of property involuntarily is by eminent domain. Eminent domain is the power of the state to take property of individuals for public purposes on the payment of proper compensation. The power must be exercised in exact accordance with statutory authority and such authority may be given either by the United States or by the states. Property taken by this means can be used only for a public use, but the question of what is a public use is one on which the decisions are very conflicting, and which on account of the development of society it is impossible to define arbitrarily.[90] Real estate within the jurisdiction or any right in real estate as an easement or any estate less than fee may be taken by eminent domain. The taking may be done without notice to the landowner but must be in the form prescribed by the statute. The only necessary accompaniment of a taking by eminent domain is the obligation of compensation to the landowner. This obligation is universally imposed by the constitutions of our several states, and is a portion of that "due process of law" required by our Federal Constitution. A more extended treatment of this topic,

[89] Davis, J., In re Browning, Massachusetts Land Court Decisions, pp. 5, 7.

[90] South Park Commissioners v. Montgomery Ward & Co., 248 Ill. 299, 93 N. E. 910.

Eminent Domain, will be found elsewhere in this work.[91]

674. **Right to take easement by eminent domain.**—The true view of the right of eminent domain is that whether or not it is expedient to use it in a given case is a political rather than a judicial question. The right of eminent domain is a tribute of sovereignty which cannot be contracted away or extinguished, and hence although it is well settled that if the state is grantee of land dedicated to a particular use, it cannot divert it to a different use,[92] still it would seem that a decision that the state could not condemn the easement of an owner abutting on a park to keep the park open was going too far in limiting the right of eminent domain.[93]

675. **Tax sales.**—Another form of involuntary transfer of land where the new owner does not base his title in any way on the title of any former owners, but gets title good against all the world, is by tax sale. Land is commonly subject in all the states to a lien for the taxes imposed upon it, and this lien is usually enforced by means of a sale, called a tax sale, and the purchaser at such sale has a title, if the sale is valid, which is good against all the world, subject, however, to any possible right of redemption. The power to sell land for taxes exists only by virtue of express grant, and such statutes are strictly construed. It is essential to the right of sale that the original tax shall be

[91] See subject, EMINENT DOMAIN.

[92] Jacksonville v. Jacksonville Railway Co., 67 Ill. 540.

[93] South Park Commissioners v. Montgomery Ward & Co., 248 Ill. 299, 93 N. E. 910.

validly assessed and that the taxes be due and unpaid, and that the property be such as is liable to be subjected to that purpose. It is essential to the validity of the sale in most cases that proper notice of the intended sale be given, the notice containing the amount of taxes due, the time and place of the sale, and a description of the property. Public advertising is usually necessary either in a newspaper or by posting. The sale must be of a lot described as coinciding with the lot on which the assessment was made. Statutes usually give the landowner a certain period for redemption from tax sales, after the lapse of which the buyer has a clear title to the property. This subject is considered more at length in the article on Constitutional Law and in the article on Taxation.[94]

676. **Bankruptcy.**—One mode of involuntary transfer of property is by bankruptcy, which is a subject treated elsewhere in this work more particularly.[95] The effect of an adjudication in bankruptcy under the federal law is to turn over to the trustee in bankruptcy, when appointed, all the property of the debtor, both real and personal. The transfer of title takes place on the appointment of the trustee, the title of the trustee on his appointment relating back to the date of the adjudication.[96]

"The mere filing of a petition in bankruptcy * * * is a caveat to all the world, and in effect an attachment and injunction" against the bank-

[94] Oregon Short Line R. Co. v. Hallock, 126 Pac. 394 (Utah), LEADING ILLUSTRATIVE CASES.

[95] See subject, BANKRUPTCY.

[96] Christopherson v. Harrington, 136 N. W. 289 (Wis.).

rupt's property.[97] "The filing of the petition is something more than the dedication by the bankrupt of his property to the payment of his debts; * * * the trustee is not only invested with the title of the property, but since, after the filing of the petition, the creditors are powerless to pursue and enforce their rights, the trustee is vested with their rights of action with respect to all property of the bankrupt transferred by him or incumbered by him in fraud of his creditors, and may assail, in behalf of the creditors, all such transfers and incumbrances to the same extent that creditors could have done had no petition been filed. The filing of the petition, followed by seizure and by adjudication, is a seizure of the property by law for the benefit of creditors, and an appropriation of it to the payment of the debts of the bankrupt. It is a seizure of the property by legal process, equal in rank to and of the same force and effect as by execution or attachment."[98]

[97] Mueller v. Nugent, 184 U. S. 1, 14; Bank v. Sherman, 101 U. S. 403.
[98] In re Rodgers, 125 Fed. 169.

CHAPTER LXI.

FORFEITURE FOR CRIME.

677. **History—Rebels.**—A forfeiture of the real estate of a criminal was an ordinary part of the mediaeval administration of justice, but has been almost entirely done away with in this country. Our best known instance of it occurred during the Civil War when there were various forfeiture statutes passed by Congress confiscating the lands of those in rebellion against the federal authority, and it has been held that these statutes forfeited only the life estate of the rebel, the fee remaining in him after confiscation. Yet the court holds further that the rebel had no power of alienating any interest in the real estate remaining in him until his disability was removed by the proclamation of amnesty and pardon, which was made in 1868.[99] Still the rebel was at liberty to add to his deed covenants of seisin and warranty and when the amnesty proclamation removed his disability these inured in their benefits to the grantee.[1]

678. **Confiscation sale.**—It has been held that a title of a purchaser at a confiscation sale, to whom after the sale the person from whom the property had been taken had made a general release without warranty, is not a valid title, as it is ineffective be-

[99] Menger v. Carruthers, 3 Kan. App. 75, 44 Pac. 1096.
[1] Jenkins v. Collard, 154 U. S. 546, 12 Sup. Ct. 868.

yond the life of the rebel and his release did not enlarge it.[2]

679. **When title passes.**—Property forfeited is not vested in the government at the moment of forfeiture; on the contrary, the established doctrine is that, notwithstanding the forfeiture, the title to the property remains in the owner until it is actually seized by the government, and then, after seizure, the title of the government relates back to the time of the forfeiture.[3]

680. **Forfeiture for crime today.**—The Federal Constitution expressly provides that "no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted."[4] Forfeiture of title to real estate for crime in this country practically does not exist. The only case where what amounts to a forfeiture is practiced is where the beneficiary under a will or an heir commits murder in order to obtain the property of the person murdered; in that case it is well settled that the courts will not permit the criminal to reap the fruits of his crime.[5]

[2] Chaffraix v. Shiff, 92 U. S. 214.
[3] Clark v. Protection Insurance Co., 1 Story 109 (U. S.).
[4] Constitution, Art. III, § 3.
[5] Riggs v. Palmer, 115 N. Y. 506, 22 N. E. 188.

CHAPTER LXII.

SALES ON EXECUTION.

681. **Proceedings.**—Although at common law real property could not be made liable for debts, it is now almost universally so provided by statute. An attachment issued in most states is only a lien on the property and can of itself pass no title. Where, however, the claim of the creditor passes into a judgment of the court, the court will also order the issuance of an execution which is a paper giving authority to the sheriff to seize the property of the debtor and collect the claim. The sheriff may then make what is called a levy on the property, which is commonly done by filing a notice, as provided in the statute on the registry of deeds. Thereupon, the sheriff should issue proper notice to the debtor and to all other parties interested, by publication and by personal service, as the statute in each state may direct, notifying all these parties that he is about to hold a sale of the premises. This is called an execution sale. Notice should commonly state accurately the time and place of sale, the terms of sale, the description of the property to be sold, names of the parties, amount of the judgment, and the signature of the officer making the sale. The length of the notice and the place of sale are, of course, determined by statute. Where the property levied upon consists of various parcels, it is the usual rule that

it should be offered for sale in parcels and not as one piece, unless the sale in one lot may be necessary or desirable to protect the interests of all parties, as where property cannot be divided without injury, or where it is impossible to obtain bids for separate parcels. Also where the property is subject to a common mortgage it should be sold all in one piece. The sheriff at the sale should designate specifically what property is intended to be sold and the nature of the interest which he is selling. He may withdraw the property from sale on receiving offers from any responsible person to pay the debt.[6]

682. **Appraisal.**—In many states the statute requires an appraisal as a prerequisite to a sale on execution, and the appraisers should properly take into account the liens upon the property and give definite notice of their action and an opportunity to the parties to be heard before them.

683. **Conduct of sale.**—A public sale should be made to the highest bidder, bids being made ordinarily orally at the time and place of sale, although written bids may also be proper if received at the sale. If the highest bidder fails to fulfill his contract the sheriff must order a resale, and has no authority to deed the property to the second highest bidder. The highest bidder may have a right to sell his rights under his bid, or he may withdraw his bid at any time before the property is actually struck off to him. In order to make the sale binding, there must be a proper memorandum of the sale signed within

[6] Keaton v. Farkas, 136 Ga. 188, 70 S. E. 1110, LEADING ILLUSTRATIVE CASES.

the Statute of Frauds. And the sheriff in some states is bound to deliver to the buyer a certificate of sale, describing the property sold, and the price bid and paid, which certificate may be recorded. It is the duty of the officer to file in the proper clerk's office a return which should be a detailed written statement of his action.

684. **Purchasers.**—The purchaser at a sheriff's sale, of course, acquires only the debtor's title subject to all infirmities or liens out against that title. He acquires the title which the debtor had at the time the lien attached, or at the time of the sale. The sheriff or anybody representing him or in collusion with him has no right to purchase at the execution sale, neither has the appraiser who made the appraisal nor the auctioneer employed to sell the property. The execution plaintiff and the execution defendant have a perfect right to bid, and also the plaintiff's attorney and the defendant's attorney may bid.

685. **Deed.**—A sale is not complete without the execution and delivery of a sheriff's deed, which should be given by the sheriff after the time of redemption to the purchaser, setting forth the judgment and the sale and other proceedings which led up to the deed. The deed should properly describe the property and need not necessarily be acknowledged although it should be sealed. The sheriff's deed relates back and covers the interest the defendant had at the time of the institution of the lien, or, in some states, at the date of the sale. The sheriff's deed may on proper occasion be amended

to correct mistakes by the sheriff, and the sheriff may himself execute a new deed. Equity may reform a sheriff's deed, or the defendant may obtain the cancellation of the deed for irregularities.

686. **Vacating sale.**—The courts have jurisdiction, where the sale is unfairly or collusively made or where other irregularities took place, to vacate the sale, setting it aside absolutely. It has been held that there is no limit to the time in which an application may be made to vacate a sale when it is absolutely void, so that the Statute of Limitations cannot be relied upon by conveyancers in regard to execution sales.[7] A party who took part in a sheriff's sale without objection, or who benefited under it, will be held estopped from denying that it was regular. A sale may be attacked by any person who was injured thereby, as by the owner of the paramount title, by the plaintiff or defendant in the execution, or by the purchaser, or by other judgment creditors.

An execution sale cannot be attacked collaterally where it is voidable and not merely void, but a direct attack upon it should be made by separate proceedings. If an execution is relied upon in a chain of title, for example, it cannot be claimed on ordinary proceedings between two claimants to the land that the sale was invalid. Where an execution sale is void the rights of the parties who have been affected by it may be adjusted in equity and restitution made to any purchaser who has actually paid money relying on the validity of the proceedings.

[7] Brooks v. Lewis, 22 Wash. 192.

CHAPTER LXIII.

PARTITION.

687. **Nature.**—Another method of involuntary transfer of property is by proceedings in partition. Wherever property is owned by co-tenants, it is commonly provided by statute that any one of them has a right to apply to a suitable court to have his rights severed from the interests of his co-tenants. This is done in one of two ways, either by sale of the property and division of the cash proceeds, or by setting off to each co-tenant his fair share in the partnership property. The partition by sale usually takes place where property is of such a nature that it cannot fairly be divided into parcels proportionate to the rights of the various co-tenants. Partition is a matter of right, but the absolute right of the co-tenant to the partition may be waived or contracted away by a valid agreement, or there may be restrictions on the property when left by deed or will which render such proceedings impossible. Public policy may forbid partition of property, as in case of a railroad or a cemetery, but aside from this limitation, any property can be divided in partition which can be held by co-tenants.

688. **Who is entitled to partition.**—Partition could not be compelled by joint tenants and tenants in common at common law, but coparceners had this right, as their relations were involuntary in their

inception. The inability to divide property was often a great injustice to the co-tenants and in the time of Henry VIII a general partition statute was passed in England. It is fundamental to partition proceedings that there be no dispute concerning the title or at least that the petitioner be in actual possession of the premises, as partition does not contemplate the trying of paramount titles to the premises but a division of lands already in the possession of the petitioners. The rule is satisfied by the possession of one co-tenant as his possession is in law the possession of all co-tenants. Furthermore, where lands are actually vacant the co-tenant may maintain partition proceedings as he then has constructive possession on account of his legal title. There are a few jurisdictions where it is held that possession is not necessary, where a mere right of entry is sufficient. Remaindermen or reversionary interests have no right to partition except by express provision of statute. In most cases heirs or devisees of a deceased person cannot maintain partition until the expiration of the time allowed for the settlement of the estate.

689. **Accounting, owelty, sale.**—When partition is arranged, proper allowance should be made for improvements made by one or more tenants on the property and for the payment of taxes or other charges on the property; an accounting should also be had for rents and profits of the property collected by one or more of the co-tenants.

It sometimes happens that land to be partitioned is not capable of an equal division. In such case the

person getting the larger portion may be required to pay to the other a sum of money for the purpose of equalizing the respective shares. This payment of money is called owelty of partition.

A sale under order of the court in partition is a judicial sale and is governed by the same principles as execution sales, which we have already considered. Such sales should be carefully scrutinized by the conveyancer, as the court has no jurisdiction except under implicit conformity to the statutes.

CHAPTER LXIV.

ADVERSE POSSESSION.

690. **Origin of title by prescription.**—One form of title based on possession is that by prescription. The earliest Statute of Limitation in England was passed in 1275, and in form simply barred the remedy of any claimant after a certain number of years. The right to hold by lapse of time is entirely statutory and the statutes simply bar the remedy and say nothing about the passing of title. The judges grew into the habit of instructing juries that they might find after twenty years' possession that the person in possession had a valid title to the property and that the former owner had lost his deed. Gradually the burden of proof was changed and the judges instructed the juries that there was a presumption from twenty years' possession that there must have been a lost grant and that the jury should find such unless there was rebutting evidence. Then, finally, the rule was extended so that it became a rule of law that twenty years' adverse use of itself gave good title.

691. **Nature of claim.**—Adverse possession must be twenty years' adverse possession against every claimant. So, if an estate is divided in interest the squatter must occupy for twenty years after the right of the last remainderman accrues. All disseisins are in fee and so all adverse possessions are

in fee. It is not necessary that the claim of right as a foundation for adverse possession should be made in good faith.[8] It is enough if the true owner is out of possession for twenty years. The question is whether there is an unlawful possession for which the true owner has a right to bring ejectment.[9]

692. **Knowledge of owner.**—It is enough that the use is open and notorious and it is therefore immaterial that the owner was ignorant of it. The mere inattention of the owner of land to the fact that an easement in it is used by another, does not weaken the force of the presumption which the lapse of time creates. Such presumptions, like the Statute of Limitations, will work out their purpose, though the party affected by them should close his eyes. It would not do to say that the ignorance of the owner repelled the presumption of a grant. So evidence is insufficient that the reversioner was not in the habit of going to see the land in question and never visited the portion over which a certain right of way was claimed and never knew about it.[10] On the other hand, statements by a servient owner that he never knew of a certain drain through his land, may be sufficient to rebut the theory of prescription and it may be held that no prescriptive right is raised under such circumstances.

693. **Easements by prescription.**—Easements by

[8] As to occupation by mistake see Clinchfield Coal Co. v. Viers, 111 Va. 261, 68 S. E. 976, LEADING ILLUSTRATIVE CASES.

[9] Locklear v. Savage, 159 N. C. 236, 74 S. E. 347, LEADING ILLUSTRATIVE CASES.

[10] Reimer v. Stuber, 20 Pa. St. 458. As to possession of small barren island, see Hooper v. Leavitt, 109 Me. 70, 82 Atl. 547, LEADING ILLUSTRATIVE CASES.

prescription accrued at common law before the passing of Statutes of Limitation. The earliest theory in regard to them was that the easement should have existed from time immemorial and that then the rights claimed under it were lawful. Then a presumption was raised from twenty years' adverse enjoyment that the enjoyment had been from time immemorial. This presumption might be rebutted by proof that the easement could not have been enjoyed so early, or by proof that, as a matter of fact, it was not so enjoyed. A prescriptive right depends on the nature of the use. The test is whether the old use is radically different from the new, or whether it is merely a fraction of the new; so, for example, the deepening and enlarging of a drain is an interruption and a new use, but a mere increase in the amount of drainage is not.[11]

694. **Same subject—In the United States.**—The doctrine in this country is that the Statute of Limitations is applied by analogy to easements as to titles.[12] So where the plaintiff brought suit on account of the erection of a building within twenty-five feet of his windmill, cutting off the wind, the court holds that no right by prescription can arise where the right claimed could not have been interrupted. So it would have been difficult, if not absolutely impossible, to interfere with or prevent the exercise of the right claimed in this case, and it is clear that there is no presumption of a grant of easement from the non-interruption. There is

[11] Shaughnessey v. Leary, 162 Mass. 108.
[12] Gay v. Boston & Albany Ry., 141 Mass. 407.

authority, however, which bases the acquisition of the easement on the theory of a lost grant and that where it rests on the presumption of a grant which a railroad has no right to make, then no prescriptive easement of a right of way can be acquired against the railway.[18]

695. **Defenses against acquisition of easements by prescription.**—The theory of easements by prescription has been carried so far that it is held the presumption will not be rebutted by proof that there was in fact no grant. The owner of the servient tenement may rebut the presumption by contradicting or explaining the facts upon which it rests, but he cannot overcome it by proof in denial of the grant. He may show that the right claimed is one that could not be granted away, or that the owner of the servient tenement was legally incapable of making, or the owner of the dominant tenement incapable of receiving such a grant. He may explain the user or enjoyment by saying that it was under permission asked and granted, or that it was secret and without means of knowledge on his part, or that the user was such as to be neither physically capable of prevention, nor actionable. But if there be neither legal incompetency nor physical incapacity and the user be open and notorious, he can only defeat the acquisition of the right on the ground that the user was contentious or the continuity of the enjoyment was interrupted during the period of prescription.

696. **Constructive possession—Color of title.**—The true owner always has constructive possession

[18] Blume v. Southern Railway Co., 85 S. C. 440, 67 S. E. 546.

over the disseisor. So the true owner may bring trespass against a squatter on his constructive possession. Constructive possession is an actual possession as far as any third party is concerned. The doctrine of constructive possession under color of title may be stated as follows: That when a party claims to hold adversely a lot of land by proving actual occupancy of a part of it his claim must be under a deed or paper title. Color of title under a deed and occupancy of part of the land is sufficient proof as to the whole lot. And the deed or paper title under which his claim is made must in the description include the premises. It is immaterial whether the title in the deed is bad or not, but if no lands are described nothing can pass, therefore where a person occupied under a deed by boundaries which showed the land to be a straight line of no width, the occupier had no title by constructive possession.[14]

697. **Requisites of constructive possession.**—The requisites of constructive adverse possession are as follows: There must be, in the first place, color of title under some writing, which must accurately describe the premises and purport to convey title. In the second place, there must be claim of ownership as well as color of title. Therefore, the instrument must on its face convey a fee. In the third place, there must be an actual possession of part of the land indicating a further claim in order to give notice of the adverse claim and to afford ground for an action.

[14] Roe v. Doe ex dem. Tennessee Coal, Iron & R. Co., 162 Ala. 151, 50 South. 230 (Ala.).

And so it is not enough that the actual possession be only of the claimant's own land, but by a decided weight of authority the claimant must have an honest belief in the validity of his title, although on principle it would seem that evidence of bad faith was immaterial, as the doctrine of adverse possession really covers claims under color of title, because the paper title is evidence of the extent of the claim and notice to the owner. Constructive adverse possession should exist only where the true owner must have notice of the claim and its extent, and therefore by statute in some states the writing showing color of title must be recorded in order to be effective, although this is not the usual rule.

698. **Nature of claim under paper title.**—The rule that the title of a stranger by adverse possession must be under claim of title does not further require that such claim must be consciously hostile to the true owner, and it is settled that when the defendant's claim to the entire tract which he has occupied rests upon adverse possession conscious hostility is not necessary. But where the defendant is given paper title to a part of the land occupied and title by adverse possession is relied upon merely to extend the boundaries of his claim, many cases hold that he must occupy the additional strip in conscious hostility to the true owner. But this doctrine seems to be without foundation and puts a premium on bad faith, and the weight of authority is against it. It was sustained, however, in a recent case.[15]

[15] Clinchfield Coal Co. v. Viers, 111 Va. 261, 68 S. E. 976, LEADING ILLUSTRATIVE CASES.

699. **Amount of land which can be claimed by constructive possession.**—The American rule is that the occupation of part of a tract of land under color of title of the whole is constructive adverse possession of the entire tract. The reason for this rule is that it is impracticable for the occupant to clear and cultivate an entire farm at one time. This reasoning is obviously inapplicable to a case where actual possession of a few acres is made the basis for a claim to a vast expanse of country, and accordingly some courts have held that the amount of land which can be thus obtained must be limited to a tract which can be used in one body according to the usual manner of business of the country. The large size of modern business increases the difficulty of applying such a rule, but its necessity is clear. The weight of authority, however, seems to be against the limitation that the amount of land claimed can be limited to a parcel that can be used in one body.[16]

Constructive possession may be sustained in a proper case, although the deed giving the color of title relied upon actually passed a good title to a portion of the land.[17]

700. **Color of title will not embrace land of owner without notice.**—The rule of constructive possession cannot apply to a case where a party having a deed which embraces land to which his grantor had good title and other land to which he had no right, enters into and possesses that portion of the land which his grantor owned, but makes no entry into that part

[16] Marietta Fertilizer Co. v. Blair, 173 Ala. 524, 56 South. 131 (Ala.).
[17] Roe v. Doe, ex dem. Rowe, 159 Ala. 614, 48 So. 1033.

which he could not lawfully convey. There is no notice in such case to the owner of the land thus embraced in the deed and no possession which can be deemed adverse to him. For the purpose of adverse possession there must be actual possession of some portion of the land of such owner and the possession must be of such a nature as to give notice of an adverse claim.

701. **Successive constructive possessions.**—The constructive possession of the first occupier prevails over that of the second. So, where A had improved a portion of land to which he held a deed, he had a good color of title and good constructive possession to the whole property. This valid possession cannot be defeated by a subsequent entry of B improving a portion and claiming title to the whole. The subsequent entry gives possession and a title after the statutory period only to the portion actually occupied.

702. **Agency of relative for constructive possession.**—Where a prescriptive title arose in one holding land adversely for seven years with color of title and the plaintiffs claimed as heirs of a deceased sister who had color of title but not possession, and where after her death the plaintiffs' father entered adversely to the true owners and on his death the plaintiffs entered but had not occupied for seven years, the court holds that the plaintiffs cannot avail themselves of the father's possession. The only way in which they could do so was by claiming that their father held under their color of title as their agent. Color of title is inheritable, so that the plaintiffs pos-

sessed one of the two requisites for good title, but there being no evidence that the father was holding as their agent, it was correctly decided that the relationship between the parties did not imply an agency.[18]

703. **Projecting eaves.**—Where a landowner builds a shed with overhanging eaves projecting over the land of his neighbor, this is such a taking of the land underneath the eaves as will found a claim by prior possession to that land against one who put it under cultivation. And it has even been decided that the overhanging eaves give the owner such possession of the land beneath them as to prevent exclusive possession in another.[19]

704. **Transfer by disseisor.**—Where a person acquires complete title by adverse possession by holding for the statutory period, he cannot transfer this title by merely giving up the possession. The title is equally valid when once acquired whether it be by disseisin or by deed, and a judgment at law is not necessary to perfect a title by disseisin any more than one by deed. The title in either case is to be shown by legal proof and a continued disseisin for twenty years is as effective as a deed. At any time before the disseisin has ripened into a title, the disseisor may abandon the land, or surrender his possession by parol to the disseisee. But after the disseisin has continued so long as to take away the right of entry and bar action for the land by limitation, it cannot

[18] Barrett v. Brewer, 143 N. C. 88, 55 S. E. 414.

[19] Lins v. Seefeld, 126 Wis. 610; contra, Randall v. Sanderson, 111 Mass. 114.

be conveyed by a parol abandonment or relinquishment, but it must be transferred by deed. A parol conveyance of land creates nothing more than an estate or lease at will, and therefore the disseisor still has title to property after such parol abandonment until a new title arises by adverse possession.[20]

705. **Disseisin by election.**—The process in the old law known as disseisin by election arose in this way: The original possessory action was a writ of entry, which was very cumbersome, and a proceeding known as assise of novel disseisin was contrived to take the place of that writ and was much simpler, and so came into great favor. The plaintiff in such an action had to be a disseisor. And then the action was allowed where the plaintiff was not disseised, but where he elected to allow himself to be disseised.

706. **Grantee under unrecorded deed.**—The doctrine of title by adverse possession is founded on the existence of a right of action against persons in possession. But the statute will not run in favor of a person in possession under an unrecorded deed, as the deed is good as between the parties, and there is no one who has any right to bring action against the grantee. As soon as the grantor makes a mortgage or conveyance then the statute would begin to run, as there at once arises someone who has a right of action against the possessor.[21]

707. **Between husband and wife.**—The question has been frequently raised whether a wife can ob-

[20] Winthrop v. Benson, 31 Me. 381.

[21] McVity v. Tranouth (1908) App. Cas. 60 (Eng.); Sutton v. Pollard, 96 Ky. 640.

tain title to her husband's property by adverse possession. It is much easier to hold that she can obtain such rights where she has by statute a separate property in her own land and it seems to be the modern tendency that where a wife is deserted by her husband the reason for her disability to obtain rights against his land disappears and such title by adverse possession may well be sustained.[22]

708. **Remainders or reversions.**—It may be laid down as a general principle that the prescriptive period does not begin to run to bar future interests until the future interests become entitled to possession. Suppose there is a gift to A for life, remainder to B in fee, and A is disseised and dies fifteen years later. B has twenty years after A's death to bring suit, as his right of action did not accrue until A's death. If a tenant for years allows a user for thirty years the reversioner is not bound unless he has a right of action on account of it. A use adverse to the tenant amounts to nothing, as it does not bind the landowner.

On the other hand, where a tenant for years or for life suffers an easement to be enjoyed against the land for twenty-one years, it raises no presumption of a grant by a remainderman. But where land was occupied by tenants from year to year, the owner of the fee was in possession and had a right to bring suit every year. The case is wholly different from that of one who is out of possession during the whole of the time.[23]

[22] Union Oil Co. v. Stewart, 158 Cal. 149, 110 Pac. 313.
[23] Reimer v. Stuber, 20 Pa. St. 458.

709. **Possession under a lease.**—The early English statutes, as, for example, the Statute of James,[24] on which the later statutes are based, merely barred the right of entry after twenty years, and the courts, as a matter of judicial legislation, required actual disseisin to set the statute running. For disseisin a claim for freehold was necessary and therefore under the old law a claim under a lease for years would not be sufficient to set the statute running. There is authority, however, to the effect that a tenant under a void lease for ninety-nine years who had remained in possession more than the statutory period of twenty years, could not be ousted until the end of the ninety-nine years.[25] This case is opposed to some other earlier cases.[26] There is much to be said in favor of the most recent case on the subject, as the purpose of the statute is to bar stale claims and this purpose is as much needed and as much served in the case of a lessee as where the claim of the life tenant is adverse. The question cannot, however, be said to have been finally decided in this country.

710. **Effect of deed by lessee.**—Where a landowner leased premises for five years and the lessee made a conveyance in fee, and the defendant took possession in good faith, thinking the lessee was an owner and had held possession for the statutory period, and where the real owner had no knowledge of his lessee's disavowal of the tenancy, it has been

[24] Stats., 21 Jac. I, c. 4 (Eng.).
[25] Warren County v. Lamkin, 93 Miss. 123, 46 South. 497.
[26] Bedell v. Shaw, 59 N. Y. 46.

recently said that under the Wisconsin statutes, which are interpreted by the principles of common law, the defendant, having entered in good faith under color of title, has acquired a valid title.[27] The general law is, however, that the statute does not begin to run until notice is brought home to the owner of the disavowal by the tenant of his tenancy, as the tenant's possession is never adverse.[28]

711. **Prescription between states and nations.**—The principles of adverse possession are applicable to the states in the union and also to nations.[29] So in a recent case between two states in this union, where it appeared there had always been some controversy as to the exact boundary between the states, but a line surveyed over a hundred years ago had been practically followed and titles had grown up based on that line, the principles of justice compelled the states to acquiesce in that line on the theory of prescriptive rights between individuals.[30]

712. **Municipalities.**—It is well settled that the Statute of Limitations does not run against a state in favor of an individual and it would seem, therefore, that a municipal corporation acting for the state as an agent therefor should have the same rights and not be bound by the Statute of Limitations. There is a recent case, however, which illustrates the difficulties of the situation, where a state had created

[27] Illinois Steel Co. v. Budzisz, 139 Wis. 281, 119 N. W. 935.

[28] Wells v. Sheerer, 78 Ala. 142; Bedlow v. N. Y. Floating Dry Dock Co., 112 N. Y. 263.

[29] Adverse possession against state, see Whitley County Land Co. v. Powers Heirs, 146 Ky. 801, 144 S. W. 2.

[30] Maryland v. W. Virginia, 217 U. S. 1, 30 Sup. Ct. 268; See Wheaton, International Law, § 164; Vattel, The Law of Nations, § 149.

the trustees of public schools as bodies corporate, and the court holds the Statute of Limitations may be a defense to an action of such a corporation to recover land which had been adversely occupied for more than twenty years.[31]

713. **Estoppel against municipalities.**—It is generally laid down that one who encroaches on the public domain does so at his peril. It is also well settled that adverse possession cannot run against the state. In many cases, however, the same result has been reached by allowing a practical adverse possession to prevail against municipalities which the courts are fond of placing on the ground of estoppel. For example, in an Illinois case a private corporation had for over forty years exclusive use of streets in an unused portion of the city and had invested large sums of money which would be lost if the streets should be reopened, and the court holds that the city is equitably estopped from claiming that the corporation's buildings constituted an obstruction of the street.[32]

714. **Tacking adverse interests.**—To make a disseisin effectual to give title under it to a second disseisor, it must appear that the latter holds the estate under the first disseisor. So the disseisin of one must be connected with that of the other. Separate successive disseisins do not aid one another where several persons successively enter on land as disseisors without any conveyance from one to another, or any privity of estate between them other

[31] Brown v. Trustees of Schools, 224 Ill. 184.
[32] Chicago v. Illinois Steel Co., 229 Ill. 303, 82 N. E. 286.

than that derived from the mere possession. Their several consecutive possessions cannot be tacked so as to make a continuity of disseisin of sufficient length of time to bar the true owners of their right of entry. To sustain separate successive disseisins as constituting a continuous possession conferring a title upon the last disseisor, there must have been a privity of estate. To create such privity, there must have existed between the different disseisors some such relation as that of ancestor and heir, grantor and grantee, or devisor and devisee. This rule of privity has been carried to an extreme where it is held that an oral transfer is sufficient to base the tacking of adverse possessions. This doctrine is put on the ground that the transfer may give rise to questions between the parties, but as respects the rights of third persons it is immaterial, if successive transfers of possessions were in fact made, whether they were made by will, by deed, or by mere agreement written or oral.[33] The conveyancer should guard against this possibility in examining titles.

The doctrine of tacking adverse interests has been applied even to the case of a receiver, where the land held adversely came into the hands of a receiver who sold it. It was held that there was a continuity of adverse holding, as the receiver was the successor or possibly the quasi-agent of the original holder, and the interests could therefore be tacked.[34]

715. **Interruptions.**—Adverse possession may be interrupted by an entry by the true owner, but this

[33] McNeely v. Langan, 22 Ohio St. 32.

[34] Verdery v. Savannah Railway Co., 82 Ga. 675, 9 S. E. 1133.

entry must amount to notice to the squatter. It must be an explicit declaration or an act of notorious dominion by which the claimant challenges the right of the occupant. It is not sufficient for the owner to walk around on an uncultivated piece of land. What is an interruption of possession depends very much on the character of the land and the purposes to which it is adapted and used. The question is whether the adverse possession, considering the nature, situation and uses of the land, has been exclusive and continuous; and it is a question for the jury to determine whether in fact the adverse possession has been continuous or has been interrupted. It is commonly said that adverse enjoyment of easements to obtain prescriptive title must be continuous and uninterrupted. Adverse possession is continuous if it is in fact exercised and is uninterrupted if the person entitled to pay has not sufficiently asserted his rights. Interruption probably means any act proving non-acquiescence in the wrongful use. Of this character are physical obstructions to the use, or obtaining judgments against the use and even verbal threats or prohibitions may probably be sufficient under some circumstances.[35] The interruption, however, must be made by somebody who has a right to make it. A mere stranger cannot cause an interruption.[36] So a protest by a tenant for years is not sufficient to lead a landlord to complain that the prescriptive period has not run.

[35] Chicago, etc., Co. v. Hoag, 90 Ill. 339; contra, Lehigh, etc., Co. v. McFarlan, 43 N. J. Law 605.

[36] McIntire v. Talbot, 62 Me. 312.

716. **Mere protest not an interruption.**—The word "interrupted" when applied to acts done by the servient owner has received a fixed meaning, as indicating an obstruction to the use of the easement, some act of interference with its enjoyment, which, if unjustifiable, would be an actionable wrong. Mere denials of the right, complaints, or prohibitions of user will not be considered interruptions of the user of an easement or as indicating that the enjoyment of it was not continuous. The whole doctrine of prescription is founded on public policy. It is a matter of public interest that title to property shall not long remain unsettled and in dispute. Protests and mere denials of right are evidence that the right is in dispute, and if they were sufficient, the owner claiming by prescription would, in some cases, be placed at a great disadvantage. He could neither sue and establish his right, nor could he have the advantage derived from common enjoyment in quieting titles. Protests and remonstrances by the owner of the servient tenement against the use of the easement rather add to the strength of the claim of a prescriptive right, for a holding in defiance of such expostulations is proof that the enjoyment is under a claim of right hostile and adverse. If they are not accompanied by acts amounting to a disturbance of the right in a legal sense, they are not interruptions or obstructions of the enjoyment.

717. **Interruption by tenant insufficient.**—Where the defendant infringed on easements appurtenant to land in the possession of a tenant for years and before the twenty years' prescriptive period had run

out, the tenant brought suit for the infringement and after the twenty years the owner brought suit, the court holds that the suit brought by the tenant did not interrupt the running of the prescriptive period against the owner of the fee.[87]

718. **Disabilities.**—A Statute of Limitation can never begin to run during the existence of a disability, but when it once begins it will not be interrupted by an intervening disability. A disability to be counted must be operative at the time the right of entry accrues. So where A, the owner in fee, is disseised and dies fifteen years later, and leaves a son six years old, the child gets no new right of entry by descent at the time of the father's death. So his infancy is a supervenient disability and the child is barred when he is eleven years old. Suppose, further, a father is disseised when his child is one day old. There is no disability here and the son loses his rights before he comes of age. Take a case where a married woman is disseised and dies sixteen years later, leaving an infant son. She is under a disability and the infant's disability is a supervenient disability, so he has ten years after the mother's death for removing her disability. This rule applies where disabilities are in different people. But if a woman is married and a minor and insane at the time her right of action accrues, she may take advantage of the longest of these disabilities.

Suppose an estate is granted to A for life, remainder to B in fee. Suppose during A's life X begins to walk over the land and keeps on walking after

[87] Goldstrom v. Interborough Co., etc., 115 N. Y. App. Div. 323.

the remainder vests. And suppose when A dies B is an infant. In determining the adverse use the period of B's infancy would be deducted. The question turns on whether B could object to the passing over A's land, and as he could not interfere until he came in himself as a remainderman, the use was not adverse to him until A's death.

719. **Disabilities in case of easements.**—The acquisition of an easement by adverse use follows the analogy of the acquisition of title by adverse possession, and a disability arising after the adverse use is commenced and has become known to the owner of the servient estate does not suspend the acquisition of a right or extend the time necessary to acquire it. This rule should apply to tenancies created after the adverse use is commenced.[38]

[38] Ballard v. Demmon, 156 Mass. 449, 453.

CHAPTER LXV.

ACCRETION, ALLUVION AND RELICTION.

720. **Definitions.**—Accretion, or alluvion, is a latent increase in land added by water so gradually that you cannot perceive at what moment of time it is added. According to the common law, which is in force today, whatever is added in this way by accretion belongs to the owner of the land to which it is added. But if the increase is not latent, but apparent, it will be otherwise. So, for example, if the forces of a stream have broken away some part of a farm and carried it to a neighbor's farm, it continues in its first ownership. The difference between accretion and reliction seems to be that reliction may apply through the process of imperceptible recession of the water or the term may be applicable to the land left dry, and in this sense it is synonymous with the word alluvion, and the same principles regulate both words. There is no distinction between a case where the water has receded and uncovered land under the water and a case where the action of the sea has deposited by actual accretion additions to the landowner.

721. **Alluvion, avulsion and reliction.**—It was an old doctrine of the common law that the crown was entitled to increases of land by the sea. But this right in the crown did not apply to land added by insensible accretion, as the land thus increased be-

longed, as a perquisite, to the owner of the land adjacent, who was known as the riparian owner. The law of alluvion only applies where the property holder has title to the water line, for if the boundary is fixed by monuments near the water mark, the alluvion will not accrue to the owner.[39]

"Alluvion, within the rule that soil formed by alluvion belongs to the adjoining landowner, is an addition to riparian land, gradually and imperceptibly made by the water to which the land is contiguous. The test as to what is gradual and imperceptible within the rule, is that, though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on. Whether it is the effect of natural or artificial causes makes no difference as to the ownership."[40] Alluvion is different from reliction, which takes place when the water retreats from the land, and it is the opposite of avulsion, which consists in a sudden disruption of a piece of ground from one man's land and its transfer to another man's land, where it may be followed and identified. The land encroached upon by water ceases to belong to the old owner, even though the old boundaries remain visible. So if the owner's lot was narrow and the river ate it all up and then abutted on the land behind it, the owner would be entirely wiped out and his title would not be revived even if the river should sweep gradually back again.[41]

[39] Cook v. McClure, 58 N. Y. 437.

[40] St. Clair County v. Lovingston, 23 Wall. (U. S.).

[41] See, however, Mulry v. Norton, 100 N. Y. 424, considered in § 722. For a case where rapid accretion was held not to cause a change in boundary lines, see Hempstead v. Lawrence, 70 Misc. Rep. 52, 127 N. Y. Suppl. 949.

722. **Where land submerged can be identified.**—Where land is submerged by the sea, if it eventually reappears and remains capable of identification so there are reasonable marks to identify it, or if the situation and extent of the land can be known, when the sea leaves the land again, it is the rule in some states that the title thereto revests in the original owner. This is true when the water disappears from the land by its gradual retirement, or through the elevation of the land, or even by the exclusion of the water by artificial means.[42] The fact that the land is submerged during the statutory period of prescription will not bar the rights of the owners provided identity of the land can still be ascertained.[43]

723. **Reasons for rule.**—Various reasons have been given for the rule of accretion. One of the earliest reasons was that accretion was too small for the law to take notice of, as set forth in the old Latin doctrine *de minimis non curat lex,* which means that the law will not take account of petty matters. This principle has been criticized and the reason suggested that public policy is interested that all lands should have some definite owner, and that alluvion would not vest in anybody if not in the owner of the contiguous land. The most common reason for the rule, however, is that alluvion is given as a compensation for possible loss and that it is only fair that the landowner should have the chance of benefit as he has the chance of loss.[44] It is further said that

[42] Mulry v. Norton, 100 N. Y. 424.

[43] Mulry v. Norton, 100 N. Y. 424.

[44] See, for example, Saulet v. Shepherd, 4 Wall. 502 (U. S.); Kraut v. Crawford, 18 Iowa 549.

it is impossible to identify small additions to land daily; that the law disregards things of imperceptible growth; that it is compensation for the expense of preventing erosion; that changing a littoral owner into an inland owner is inequitable, as otherwise there would be many unoccupied inland strips of land; and that one purchasing on the seashore knows he is buying on a shifting boundary. These doctrines all apply equally well to waters actually nonnavigable and they have been so applied.[45]

724. **Right to alluvion a vested right.**—The riparian right to future alluvion is a vested right. It is an inherent and essential attribute of the original property. The title to the increment rests in the law of nature. It is the same with that of the owner of a tree to its fruits; the owner of flocks and herds to their natural increase. The right is a natural and not a civil one. The owner takes the chances of injury and benefit arising from the situation of the property. If there be a gradual loss he must stand it; if a gradual gain, it is his. The principle applies to streams that overflow and to those that do not overflow their banks, as where there are dikes and other embankments, and where they are not necessary to keep the water within its proper limits.[46]

725. **Effect of artificial structures.**—If a deposit of alluvium is added by an artificial structure, the ground thus created belongs to the owner of the

[45] Niehaus v. Shepherd, 26 Ohio St. 40; Foster v. Wright, 4 C. P. D. 438, 446 (Eng.).

[46] Lovingston v. St. Clair County, 64 Ill. 56; affirmed, 23 Wall. 46 (U. S.).

shore, except where the structure was built by the unlawful act of the landowner for that purpose.[47]

The approximate cause of the change of line was the deposit made by the water; whether the flow of the water was natural or effected by artificial means, is immaterial. The result as to the ownership in either case is the same. There may, however, be a right to damages for loss of alluvion due to new buildings.[48]

726. **Islands.**—The same kind of accession takes place in an island arising in a non-navigable river, which, if it occupies the middle of the river, is common to those who have farms on the banks, but if it is nearer to one side, it belongs to those only on that side who have farms on the bank. However, if the island arises in the sea, it belongs to the occupier. Where an island in a lake becomes connected with the mainland through the deposit of alluvion, the island does not thereby become the property of the owner of the shore.[49]

727. **Same subject.**—If an island forms by alluvion or by the subsidence of the water, the title is in the owner of the bed or bottom of the stream. So the island will belong to the state, if the stream or other body of water is a public one, and it will belong to the owner of the bed or bottom when it is a private one. Where, however, a river changes its course, cutting off a portion of the property of the landowner, this does not change the ownership,

[47] Attorney General v. Chambers, 4 De G. & J. 55, 57 (Eng.).

[48] Freeland v. Pennsylvania R. Co., 197 Pa. St. 529, 47 Atl. 745, LEADING ILLUSTRATIVE CASES.

[49] Bigelow v. Hoover, 85 Iowa 161.

as the title to the island resulting will still be in the original owner.[50] Where an island is formed in private waters and the bed of the water is owned by private individuals, the title to the island will depend on the title to the bed of the river, as it was at that point before the island was formed. So if the island is wholly on one side of the thread of the river, the whole island should be assigned to the owner on that side; and if it is partly on one side and partly on the other of the thread of the river, it should be divided by such line and held in severalty by the adjacent proprietors.[51]

728. **Ponds.**—The nature of rights in artificial ponds has not been settled in this country. There is some conflict of authority as to the rights in small ponds, like mill ponds. It seems clear that where the grantor's line is fixed at the high water mark of the pond and he reserves to himself no interest whatever in the water, he has then no interest, when the water recedes, in the land uncovered by the water.[52] These considerations apply to any case where the language of the deed indicates a clear intention to establish a fixed and permanent line and not one changeable by the variations of the high water mark of the water in the pond. On the other hand, it is held that an abutter on a natural pond acquires title to land left by reliction.[53]

729. **Division of flats.**—Where alluvion takes place over the land of various owners, the rule seems

[50] Hopkins Academy v. Dickinson, 9 Cush. 544 (Mass.).
[51] Hopkins Academy v. Dickinson, 9 Cush. 544 (Mass.).
[52] Cook v. McClure, 58 N. Y. 437.
[53] Boorman v. Sunnuchs, 42 Wis. 233.

to be that the new river bank should be divided in the same proportion as the old and lines should be drawn from these points to the old boundaries. But this rule does not apply to cases of an inland river where the proprietors own to the middle of the stream, in which case the alluvion should be divided by extending the original river frontage as nearly as practicable at right angles with the course of the river to the thread of the stream. Elaborate rules on the subject of dividing flats are laid down in a reporter's note in Commonwealth v. Foxbury,[54] but these rules must be read in connection with the Massachusetts Colonial Ordinance giving the landowner a right to the flats 100 rods out from high water mark.

730. **Extension of public street.**—Where the public acquires an easement by eminent domain in a street laid out to high water mark and the high water mark was moved by alluvial deposits, the public still has an easement to the new high water mark. As a street to a shifting water mark was intended an allowance was made in the condemnation proceedings for the extension of the soil.[55] So a street dedicated to the public extending to a navigable stream extends automatically over alluvial deposits, as it is clear that the donor intended a way to the water-way.[56]

[54] 9 Gray 451, 521 (Mass.). A rule for the division of alluvion between the adjoining landowners is laid down in Deerfield v. Arms, 17 Pick. 41 (Mass.).

[55] State v. Yates, 104 Me. 360, 71 Atl. 1018.

[56] Hoboken, etc., Land Co. v. Mayor, etc., of Hoboken, 36 N. J. Law 540.

BIBLIOGRAPHY.

As our real property law is largely that of England, it follows that the books by English authors are of authority here, and there are many English works, with American notes, in common use. Among these is the work by *Joshua Williams,* a very useful compendium of real property law; and The History of Real Property, by Professor *Digby,* a book of great value to the person who desires to get to the very bottom of the subject. *Washburn's* treatise on The Law of Real Property, in three volumes, is an exhaustive and authoritative work. *Minor* on Real Property (1908), and *Devlin* on Real Estate (1911) are the most valuable recent works on the subject. *Minor* is especially suited to students' needs. In addition to these authorities the student will find it necessary to read the statutes of his state to ascertain what changes, if any, have been made in the common law as to real property, and these statutes along with the leading decisions which may be found in such works as the Lawyers' Reports Annotated and in law magazines like the Harvard Law Review will afford ample material for further study.

On the very difficult topics of the Rule against Perpetuities and contingent and vested remainders, the student will find the text book by Professor *John C. Gray* of Harvard, entitled *Gray* on Perpetuities, indispensable. On the topic Restraints on Alienation the student should possess Professor *Gray's* little book entitled Restraints on Alienation. As an aid to the study of the principles involved and to show the development of the law, especially in the English cases, the student will find *Gray's* Cases on Real Property of great assistance.

QUIZ QUESTIONS

LAW OF REAL PROPERTY

(*The numbers refer to the numbered sections in the text.*)

PART I

1. What is the difference between tenements and hereditaments?
2. What did the decline of the feudal system have to do with the distinction between real and personal property?
3. What was the ancient mode of transfer of corporeal property as distinguished from incorporeal property?
4. Define the words "messuage" and "tenement."
5. Define the difference between property and title.
6. Is a lease of land for a certain number of years real or personal property?
7. Are annual crops planted by a tenant personal or real property?
8. Suppose A owns a piece of land and desires to put up a factory. He places a mortgage on the real estate in favor of B, from whom he borrows the money to put up the factory. When the factory is completed, he buys machines from C, which are too heavy to be readily moved, and, in some cases, are fitted into the floors and walls; in other cases, they are simply screwed to the floor and readily removed. He also buys from D a steam engine and boiler and a complete steam heating system of pipes and radiators. He gives C and D mortgages to cover the personal property in the factory, and then becomes financially embarrassed. E, a general creditor, begins suit and places an attachment on all his goods. B claims them as covered

by his mortgage and C and D each claim the property they sold to A. State the rights of the parties in these machines and heating apparatus.

9. State the origin of the meaning of the word heirloom.
10. Suppose a farmer sells his farm. Is the buyer entitled to the heap of manure in the cellar of the barn produced by the cattle on the farm? (a) Would you say that the same rule should apply to a livery stable? (b) What would you say in the case of an expressman, or horse trader, who sells his premises?
11. What is the nature of the interest in the ore in a mine?
12. Can there be an estate in a single room in a house?
13. Are the shares of stock in a company which owns only real estate real or personal property?
14. Explain in what way the same property may be either real or personal.
15. State what distinction practically arises between real and personal property on the death of the owner.
16. Trace the origin and history of the feudal system in Europe.
17. State when the feudal system was transferred to this country.
18. Give a history of the fruits of the feudal system.
19. Did the feudal system help or hinder in the growth of the idea of individual rights in property?
20. What was the cause of the decline of the feudal system?
21. Where did the name "manor" originate?
22. What arrangement did the villeins have to make under the manor system to plow the land?
23. What species of tenure was characteristic of manors?
24. What effect did the discovery of the mouth of a river have on the title to the surrounding land?
25. State shortly the difference between the various colonial charters.
26. By what act did the United States succeed to the English title to land in this country?
27. Trace the history of the state claims to the western lands.
28. Give a short history of the various accessions to the territory of the United States.
29. What part did the Indians play in the early titles?

30. What is the effect of discovery on the title to the land discovered?
31. On what theory has the United States treated the Indian tribes?
32. Are Indian titles sustained in this country?
33. Trace the history of the pre-emption statutes.
34. Is a grant from the government held subject to the Indian title?
35. What is meant by pre-emption?
36. What is the meaning of the word "tenure"?
37. How does the Saxon system of tenure compare with the system in use today?
38. What was the purpose of the Domesday survey?
39. From whom did the landowners trace their title under the English system?
40. Give the four principal forms of tenure.
41. What was the most honorable species of tenure?
42. Trace the history of the tenure of grand sergeanty.
43. What was villeinage?
44. What service did the tenant in frankalmoign have to pay?
45. What is the modern English tenure of land?
46. In what way is land held in this country today?
47. What is seisin?
48. How many seisins might there be of one piece of land?
49. What effect did the theory of seisin have on the ability of a man to leave land by will?
50. How could a remainderman at common law make a conveyance of his remainder interest?
51. What is the name given to ousting a man from his property at law?
52. (a) Does title to land depend upon the record in the registry of deeds, or on actual possession of the property? (b) Explain in what cases each would control.
53. What is the underlying test of ownership today?
54. What was livery of seisin?
55. What is the most ancient form of conveyance?
56. Explain the difference between livery in deed and livery in law.
57. Would you advise a client today to accept livery of seisin for land he was about to buy without taking a deed?

Suppose the owner was an eccentric individual who refused to sign a deed, but offered to put your client into possession, what would be the effect of this proceeding?

58. When did the theory of individual rights in property first arise?
59. State what prohibitions there are today against foreigners holding real estate.
60. What is the meaning of the word "mortmain," and what was the purpose of the mortmain statutes?
61. What was the first recognition in the English law of the right to convey property?
62. Why was the Statute Quia Emptores necessary?
63. When did the right to leave lands by will first arise?
64. Define the word "estate."
65. What is the distinction between freehold estates and those less than freehold?
66. What is an estate for years?
67. What is a praecipe?
68. What is the only exception to the proposition that a fee could never be in abeyance?
69. State the rule as to the succession of freehold estates in a piece of land.
70. What is an estate in frankmarriage?
71. Has a widow today a right of dower in an equitable interest held by her husband?
72. What is a reservation in a deed?
73. Define the words "estate in fee simple."
74. What was the origin of the rule that the word "heirs" is necessary to pass a fee?
75. What is the modern tendency as to the necessity of the word "heirs" to pass a fee?
76. What is the effect of a deed by A to B and his heirs on the express condition that B shall never sell the property?
77. Name the incidents of a fee simple estate.
78. Trace the history of the liability of an estate in fee simple to the debts of the deceased owner.
79. May a man have an estate in fee simple in a right of way?
80. What is a base fee?
81. What are the rights of an owner of a base fee?
82. Is it possible for a base fee to become a fee simple?

83. Distinguish between a conditional fee and an estate upon condition.
84. What is the difference between a conditional limitation and a condition?
85. What is the difference between a reversion and a possibility?
86. What is the difference between an estate tail general and an estate tail special?
87. What was a grant to A and the heirs of his body originally considered?
88. Why were estates tail originally treated as a form of conditional fee?
89. What words are necessary to create an estate tail?
90. What is the effect of a devise to "my son A and his children, but in case he dies without living issue, then to B and his heirs"?
91. Where a gift over is on a definite failure of issue, what estate does the first grantee take?
92. What is the effect of a devise to A and his children?
93. At what date in English history was the right to sell land first recognized?
94. What was the nature and effect of the Statute De Donis?
95. Why does the Statute De Donis apply only to real property?
96. Explain the effect of Taltarum's Case.
97. Could a tenant in tail at common law make a lease for a thousand years which would be binding on his issue?
98. Suppose a grant is made to A in tail and A reaches the age of ninety-eight years never having married, never having had issue, had A then a right at common law to bar the entail?
99. What was the effect of a conveyance by a tenant in tail?
100. Was an estate tail subject to dower?
101. Explain how far estates tail exist in this country today.
102. Has the legislature a right to authorize the tenant in tail to change his estate into a fee simple without the consent of the remainderman?
103. State the rule in Shelley's Case.
104. Give some of the reasons for the rule in Shelley's Case.
105. What is the effect of the rule in Shelley's Case?

106. Give some examples of the application of the rule in Shelley's Case.
107. Is the rule one of construction or of property?
108. Name certain cases where the rule does not apply.
109. What is the effect of the rule where the estate given is less than a freehold, and why?
110. Does the rule apply when the word "heirs" means children?
111. Suppose there was a grant to A and on his death to his son B and his heirs. State how the rule applies.
112. Suppose there is a devise to the testator's wife "during her life, remainder to the issue of her body by me begotten, provided also that such issue live to a lawful age, and on failure thereof remainder over." State whether the rule applies.
113. Suppose there is a gift to A, remainder to the heirs of B. Does the rule apply?
114. What is an executory trust?
115. Does the rule apply to joint estates?
116. How does the rule apply to bequests of income?
117. In what cases does the rule apply to equitable interests?
118. Suppose there is a limitation to A for life and if B should outlive her then to him for life. Does the rule apply?
119. Does the rule apply to personal property?
120. How far is the rule applicable in the United States?
121. What is the origin of life estates?
122. Is the life estate created when there was a grant to a man as long as he lives in a certain town?
123. Has the life tenant a right to sub-lease?
124. What is a cestui que vie?
125. What is the effect of special occupancy in this country today?
126. Is there any proceeding by which the remainderman can be protected against fraud on the part of the owner of the estate per autre vie?
127. What is civil death?
128. When does merger of the life estate take place?
129. When are rents apportioned?
130. Has the life tenant a right to cut wood and for what purposes?

131. Suppose the life tenant spends money to build new buildings upon his property. Has he any right to compensation against the remainderman?
132. Has the life tenant any duty to pay taxes?
133. What was "praying in aid"?
134. What, if any, restraints can be placed on the alienation of legal estates?
135. What is the difference between a direct restraint on alienation and a gift over on alienation?
136. Is it possible to restrict the right of the owner of the fee to lease land?
137. What is the reason why the restraint on alienation of a fee is void?
138. What limitations on alienation are good?
139. Suppose there is a prohibition on transferring property to all the world except relatives of the testator. Is this valid in a devise of a fee?
140. Has the testator a right to say that his land given in fee shall not be sold until six months after his death?
141. Is there any practical method today of so disposing of property that it cannot be conveyed away?
142. What conditions can be imposed on a gift to a charity?
143. Is it possible to restrain the alienation of a grant to a corporation?
144. What is the effect of a restraint on alienation where the tenant in tail bars the entail?
145. What is the effect of a prohibition on the conveyance by a life tenant?
146. What protection was given to married women in England to protect their property against their husbands?
147. Can the conveyance of a contingent remainder be restrained?
148. Is a gift to trustees in England giving them a discretion to use the property for the benefit of a bankrupt valid?
149. State the American rule of Nichols v. Eaton.
150. What is the reason for the dissent from the American rule of the spendthrift trusts?
151. Has a man a right in Massachusetts to make a spendthrift trust for his own benefit?

152. What is the difference between an implied and an expressed condition?
153. What is the nature of the interest of the grantor where an estate is granted upon condition?
154. State what would be the effect of a deed under the following conditions—that the grantee shall at once proceed to obtain a divorce from his wife, otherwise the deed to be void.
155. Suppose a lease is made providing that if the rent is not paid the landlord may re-enter and take possession of the premises. Is this condition precedent or subsequent?
156. Give an example of a condition subsequent.
157. Suppose a deed is given but on condition that the grantee remove a certain unsightly building which is upon the land. State whether this condition is precedent or subsequent, and when it should be performed.
158. What is the effect of an illegal condition?
159. What is the effect of the failure of an illegal or an impossible condition?
160. Suppose a man makes a deed to his daughter B with the income of certain property until her marriage and on such marriage said income to go over to C, a third party. Is this a condition in restraint of marriage?
161. What is the effect of a condition providing that a deed shall be made to a grantee and his heirs on condition that he does not sell the property?
162. What is the effect of a condition in a deed that no buildings shall ever be erected on the property for the sale of intoxicating liquors?
163. In what situation will the courts refuse to enforce a condition?
164. When can the grantor's reversion on the breach of a condition be assigned, and when can it not be assigned?
165. What is the effect of such an assignment?
166. What is the nature of a right of entry after condition broken?
167. State the rule in Dumpor's Case and its effect?
168. Suppose a grant is made to A, but if he dies without issue then over to B, and A does die without issue. Does A's wife have dower rights in the property?

169. What method can be used to enforce a breach of condition?
170. When will equity relieve a breach of condition?
171. What effect did the Statutes of Mortmain have on the origin of uses?
172. What word in our modern deeds is derived from uses, and why?
173. What was the purpose of conveying lands to uses?
174. What effect did the Statute of Uses have on the following conveyance: By A to B for use of C in trust for D.
175. What was the effect of the Statute of Enrollment?
176. What is the effect of the statute on the following conveyance: By A to B for the use of C for the use of D?
177. Suppose property is given in trust to trustees to preserve contingent remainders. What effect does the Statute of Uses have on such a conveyance?
178. What effect did the Statute of Uses have on the devise of land?
179. Is the Statute of Uses a portion of the common law in this country? Or must it be enacted by statute here in order to apply?
180. State what is meant by the term "equitable conversion."
181. How does the doctrine of equitable conversion apply to partnership lands?
182. When does conversion take place in cases of equitable conversion?
183. What is the presumption as to real estate held by partners?
184. Where A leases land to B with an option to buy and A dies intestate, what is the effect of a tender by B of the purchase price to the heirs of A?
185. What is the doctrine of reconversion?
186. Define the word reversion.
187. What is the meaning of the term "particular estate"?
188. What is the difference between a remainder and a reversion?
189. What is the effect of a deed to A for life and one year after his death to B and his heirs?
190. Why could not estates at common law begin in the future?
191. What was the method of conveying a reversion or remainder at common law?

192. What is the effect of a grant of a freehold at common law to take effect in the future?
193. Suppose there are successive life estates. What is the situation of the life estates following the first?
194. What is the effect on the remainder of the invalidity of a particular estate?
195. Suppose an estate is given to A for life, remainder to the heirs of B, and B is now alive. Is this estate vested or contingent in the heirs of B?
196. What is the effect of a devise to A for life, remainder to his children, but if any child dies in the lifetime of A, his share to go to the surviving brothers and sisters?
197. What is the effect of a gift over in a will to the right heirs?
198. When does a contingent remainder become vested?
199. State what alteration of interest as between contingent and vested remainders can take place before the testator's death.
200. State what alterations of interest can take place after the testator's death.
201. Is it possible to create a valid remainder where the remaindermen who will take are uncertain during the life of the particular estate?
202. What is the effect of a devise to A for life, remainder to the children of B, where B has children at the testator's death and has other children after his death and before the death of A?
203. What is the effect of remainder after an estate tail?
204. State Archer's Case and the effect of it.
205. In what cases would the word heirs be construed heirs of the body?
206. Is it of importance in considering the question whether the remainder is vested or not, to know whether the remainderman will ever enjoy the estate?
207. State a short rule for testing the vesting of estates.
208. State in what four classes contingent remainders should be divided.
209. Suppose there was a grant to A for life, remainder to the son of B, named William. When would this be valid and when void?

210. Give an example of cross remainders.
211. Is the presumption in favor of a vested remainder, or a contingent remainder?
212. Are contingent remainders preferred to executory devises?
213. What is the distinction between a contingent remainder and a conditional limitation?
214. What is the result if there was a limitation of an estate to a widow for life, remainder to A in fee on condition she remains a widow?
215. What is the New Hampshire rule as to the presumption in the case of contingent remainders?
216. How might a contingent remainder be destroyed?
217. What was a writ of formedon?
218. Give an example of a case where a contingent remainder might be destroyed by merger.
219. In what cases can a contingent remainder avail to prevent merger of other estates?
220. Under what circumstances can a contingent remainder be sold?
221. How did a deed conveying a contingent remainder take effect at common law?
222. What statutes are now in effect regarding contingent remainders?
223. Suppose your client desired you to draw his will in such a way that his son would have a right to sell the property, and still if he did not sell, that the property should then go over to a third person. How would you accomplish this?
224. What is the difference between a condition and a conditional limitation?
225. Suppose A owns a fee which he grants to B on condition that B reside in a certain place. Suppose, on the other hand, there is an estate to A provided that if he die without issue the estate shall go to B and his heirs. State the difference between these two cases.
226. (a) What is a grant to A provided she continues unmarried? (b) And who can take advantage of it?
227. Are the words "while," "until," and "provided," words of condition or of limitation?
228. How far does the rule against perpetuities apply to conditions and conditional limitations?

229. If land is devised for church purposes, is that a gift on condition or is it a trust?
230. How would you characterize the estate after the condition in the case of a conditional limitation?
231. What is the difference between a conditional limitation and an estate tail?
232. (a) What is the effect of a grant to A in fee and that so much of the estate as remains undisposed of shall go over to B in case he dies without issue? (b) State the American rule where land is devised in fee and the devisee is given a power of disposal and a provision is made that what is left shall go over to a third person. (c) How did the rule arise?
233. Define an executory devise.
234. What is the origin of an executory devise?
235. Give some examples of springing and shifting use.
236. Define the rule against perpetuities.
237. What did executory devises have to do with the origin of the rule against perpetuities?
238. How were executory devises regarded by the judges shortly after their creation?
239. What was the first statement of the rule against perpetuities?
240. Suppose a gift is made by will to A "during the lives of all persons belonging to the Unitarian Church in the village of Duxbury in which I reside who were alive at my death." State whether this gift would be valid or void.
241. What is the effect of a will giving the residue "to be placed in trust for as long a period as is legally possible"?
242. What addition was made to the rule against perpetuities in 1697?
243. Can a period of twenty-one years be added to a limitation regardless of the minority of anybody?
244. Is a gift too remote although it may take effect in favor of an unborn child of the last taker?
245. Can more than one period of gestation be included in reckoning the rule?
246. State a case in which a posthumous child would be considered as born at the death of his father. Also another

case in which he would be considered as not born at the death of his father.

247. Does it make any difference to the rule against perpetuities that the parties are too old to have children?

248. State briefly some of the reasons for the rule against perpetuities.

249. What effect does the alienability of property have on the validity of a limitation?

250. State the effect of the recent New York case, In re Wilcox.

251. Is a limitation valid which may fall beyond the limits of the rule and may not?

252. Suppose there is a limitation, which is on its face void, of a gift of a lease for seventeen years. Is this valid or void?

253. Suppose there is a gift to A for life and on her death to her husband for life and on his death to their surviving children. Is this valid or void and state why?

254. What effect on the validity of a gift does the construction have?

255. What is the result to a preceding estate if the remainder over is void?

256. What is the difference between the English and the American rule in a case like the following: a limitation to an unborn person for life with remainder to his unborn children?

257. In what case was the danger of accumulation of property first brought forcibly to the attention of the legislature?

258. (a) What is the effect of the American statutes prohibiting accumulations of property. (b) If the accumulation is directed to be for a greater period than allowed by the statute is the whole gift void, or is merely the excess void?

259. What is the difference between the English and American rule as to the application of the rule against perpetuities?

260. Why is a vested interest not subject to the rule against perpetuities?

261. What is the construction to be placed on a grant to A for life, remainder to A's unborn son for life, remainder to his sons in tail male?

262. Is a trust for the accumulation of rent during the minority of a tenant in tail valid?

263. What is the difference between a limitation after a legal estate tail and a limitation after an equitable estate tail?
264. What is the meaning of a gift to A and his heirs in fee, provided that if A dies without issue it shall go over to B?
265. What is the American rule as to the effect of a gift to A and provided A dies without issue then over to B?
266. State some of the difficulties with the American rule as to the application of the rule against perpetuities to conditions.
267. What is the effect of a bequest to trustees for an almshouse where power is given to the managers to sell and the surplus rent on sale is to go to the S and C families till they become extinct and then over on a trust to B?
268. Suppose there is a gift to A and his heirs and on failure of issue then over to B in trust for a charity. What is the effect of this gift, and why?
269. Suppose there is a gift to trustees to hold for a charitable trust with a limitation over in case the property should be diverted from the purposes of the trust. What is the effect of the limitation over?
270. Suppose there is a limitation to a certain charity. Suppose property is given to the Middleboro hospital and if the Middleboro hospital should ever cease to exist then over to the City of London for charitable purposes. What is the effect of the gift over?
271. What is the effect of a gift to a corporation to be formed?
272. What is the effect of a gift in trust for the benefit of the employees of a banking institution?
273. What is a class?
274. When must the membership in the class be determined?
275. When a gift is made to such grandchildren as reach twenty-one, when is the class closed as to such grandchildren?
276. Suppose there is a grant to John's children who arrive at the age of twenty-five and one of the children is alive and twenty-six years old at the death of the testator. What is the effect of the gift?
277. State certain rules for determining whether a devise to a class is void.
278. State when a class is closed.

279. Suppose there is a gift to all of my grandchildren who reach twenty-one. What is the effect of that gift?
280. What are the requisites of a valid appointment under a power?
281. Suppose A makes a lease of property to B for life and then as C may by deed or will appoint. What is C's interest?
282. Suppose A gave trust funds in trust for his daughter B and as B should by will appoint. What is the nature of B's interest?
283. From what date should the validity of an appointment be reckoned?
284. When is a power of sale valid and when void?
285. What is the Pennsylvania rule in case the description is void on its face but valid when applied to the facts? Criticize this rule.
286. What is the English rule in case there is a will devising to A for life with power to appoint to her children or descendants and A appoints by will to her children for their lives and all the children were actually born in the lifetime of the testator?
287. What is the effect of a modifying clause on the application of the rule against perpetuities?
288. What is the effect of a clause against anticipation on the rule against perpetuities?
289. What is the rule where there are different contingencies on which a gift over may take place and some may happen in the rule against perpetuities and some need not so happen?
290. What are the rights of survivors in case of a tenancy in common?
291. What is the presumption today in a conveyance to A and B? Is it a tenancy in common, or a joint tenancy?
292. What is the commonest estate in co-tenancy in this country?
293. What is the effect of a conveyance to A and B, their executors, administrators and assigns?
294. What is the only case in which a tenancy by entirety can arise?
295. What property can be held in co-tenancy?

296. Where A, the owner of land, sells standing timber on the land of B, what is the relation of A and B?
297. Give a definition of a tenancy in common.
298. What is the effect of a conveyance by an owner of an undivided interest in his land?
299. What is the effect of a death of an owner intestate on the ownership of the property?
300. When is a widow a tenant in common with other heirs?
301. Suppose A gives a mortgage of Whiteacre to B for a thousand dollars, and another mortgage to C for a thousand dollars. What are the interests of B and C in case they both foreclose?
302. Suppose A owns a large farm and grants ten acres out of it to B. What is the nature of B's interest in the farm?
303. Make a statement of the interests of partners in partnership real estate.
304. Can a widow have dower in a tenancy in common?
305. Suppose one tenant in common is in possession of property and he makes permanent improvements to the property. What is his interest in these improvements?
306. What rights to possession have co-tenants in property?
307. Is a tenant in common liable to co-tenants for rent for occupation of the premises?
308. Discuss the North Carolina rule as to the right of a tenant in common to purchase at a foreclosure sale of the property.
309. Can tenants in common join in an action to protect their rights?
310. Describe how an estate in joint tenancy may be created.
311. May a joint tenancy be of an estate for life?
312. What is the meaning of the requirement of unity of time in joint tenancy?
313. Can dower and curtesy exist in joint tenancies?
314. What is the effect of a grant to A and B as trustees?
315. What interest do the creditors hold when they have a joint mortgage and foreclose?
316. Suppose there is a devise by A to B, C and D of land as joint tenants and B dies before the testator dies? What is the effect?

317. What is the effect where one joint tenant conveys his share to another?
318. What is the origin of partition proceedings?
319. Make a statement as to the statutes regarding joint tenancy.
320. What is the difference between coparcenary and joint tenancy?
321. What is the liability of coparceners to curtsey and dower?
322. Explain how a person may be in coparcenary with himself.
323. What is the effect of a conveyance by a coparcener?
324. What is the present condition of estates by coparcenary?
325. What is the effect of marriage on property rights at common law today?
326. Suppose a wife is divorced from her husband. What estate does she then have in the property which she held as tenant by entirety with him?
327. For what purpose were the estates of dower and curtesy created?
328. Suppose A is about to marry B and just before marriage A conveys away all his land to C to hold in trust for him under an undisclosed trust. Suppose further A has no personal property of any amount. What, if any, rights has B on marriage?
329. What was the reason for the distinction between wild land and other lands as to curtesy and dower rights?
330. What was the origin of the doctrine of community property?
331. What would be the effect of a statute depriving a husband of the right to dispose of community property without the consent of the wife?
332. Suppose a child is born alive and dies immediately after. Does the husband have curtesy?
333. How far does curtesy exist in this country by common law apart from statute?
334. When does curtesy become consummate?
335. Name the requisites of an estate of curtesy.
336. What is the nature of the husband's interest after the birth of issue?
337. Is a seisin by deed without actual entry sufficient basis for curtesy in this country today?

338. What is the most usual method of barring an estate of curtesy?
339. Suppose property belongs to the wife, and she is evicted by a squatter, who remains for more than twenty years. After the lapse of twenty years and before any children are born of the marriage, what rights has the husband in the property?
340. If the question of the effect of adverse possession on curtesy were to be decided by analogy, how would it be decided?
341. To what equitable interests does curtesy attach?
342. Why cannot curtesy be barred by the will of a devisor leaving land to the wife?
343. Frame an instrument placing the property of the wife in trust in such a way as to bar the husband's curtesy.
344. What has been the effect of statutes in this country in general on dower rights?
345. Why was dower granted at common law?
346. Suppose a man in this country becomes a rebel, and his property is confiscated by the government. Has the wife any dower rights?
347. What change takes place in the dower interest on the death of the husband?
348. Has a wife any rights in her husband's estate where he has sold land without her consent and kept the proceeds for himself?
349. Is the wife's interest in land before the husband's death a property right?
350. Has the widow of an alien any dower rights in this country today?
351. Is a purchase money mortgage subject to the dower interests of the mortgagor?
352. What is the widow's right to dower on foreclosure, and how would it be protected?
353. Suppose A gives a mortgage on land he owns and B joins in the mortgage, and then A conveys the land in satisfaction of the mortgage. Has B any rights to dower in the property?
354. State the law in this country as to the widow's right to dower in wild lands.

355. Suppose the husband is the lessee under a lease for a thousand years, paying as rent one peppercorn a year. Has the wife dower in this interest?

356. Is the widow entitled to dower in premises which rightfully belong to the husband, but which he has never been able actually to take possession of on account of the wrongful possession of a squatter?

357. What was the rule as to dower on exchange of property?

358. What is the American rule as to dower in equitable interests?

359. If A is a tenant in tail and dies without issue, does A's wife have dower in the property, and why?

360. Give an example of the rule that a person cannot have dower out of dower.

361. If you were acting for the purchaser of property, how would you insist that the dower rights of the wife of the seller be barred?

362. Is there any way to protect the interests of the wife when the husband dedicates his land to public uses, or it is taken by eminent domain?

363. (a) Suppose a husband obtains a divorce on account of the adultery of the wife. Does this bar her from her dower? (b) Suppose the wife obtains the divorce on account of the adultery of the husband. Does she still have her dower?

364. Explain the nature of a jointure.

365. (a) What is the effect of taking by a wife under her husband's will? (b) What paper would you draw for her to sign in order for her to bar her dower in case she takes as a beneficiary under her husband's will?

366. Is a dower right barred by adverse possession for twenty years during the life of the husband?

367. In what form should the assignment of dower be evidenced today?

368. (a) What is the meaning of the expression "assignment of dower against common right"? (b) How is it assigned?

369. Is a demand necessary before starting proceedings to enforce dower?

370. As of what date is the value of dower estimated?

371. What is the common law rule as to the rights of the widow as affected by improvements on the property?
372. What is the purpose of the homestead statutes?
373. What would you say as to the effect of a homestead law on the claim of a person who was a creditor at the time of the passage of the law?
374. Suppose A has borrowed money of B and before payment the legislature passes a law repealing the homestead exemption. Is A's homestead subject to this debt, and why?
375. Who are the most common beneficiaries of the homestead statutes?
376. Suppose a farmer is supporting his sons and his sons' wives in various cottages on his farm. Are these people all living in one family, so that the father is the head of the family?
377. Is a man the head of a family when he is living with a brother who is not able to support himself?
378. Is a man living alone with servants the head of a family?
379. Suppose A, a single man, owes money and becomes married; whereupon his creditor attempts to levy on his homestead property. Can he claim exemption against this debt?
380. Under what circumstances can a wife be regarded as the head of the family?
381. Is it customary to protect the rights of children in homestead property?
382. What is the effect of a divorce on homestead rights?
383. Suppose the homestead statute is not confined to persons domiciled in the state. Is there any reason for confining the exemption to residents?
384. What estate is necessary to support a claim of homestead?
385. Can a debtor claim a homestead in property which he only leases?
386. Is it possible for a purchaser to claim a homestead where he is occupying the land only under an oral contract to purchase it?
387. In what cases would equitable interests be a sufficient foundation for a claim of homestead?
388. What is the application of the rules of homestead to partnership property?

389. Suppose a man buys land and starts building a house upon it, which he intends to occupy as his family home, and while the house is building he boards near by with his family. Can he claim homestead in this property at this time?

390. Can a debtor claim homestead rights in a hotel, part of which he uses as his residence and part of which he uses for hotel purposes?

391. Suppose a farmer has a pasture detached from his farm, which he is using in connection therewith for pasturing his cattle? Is this properly claimed as homestead?

392. Suppose a landowner sells his homestead property. Can a creditor attach the proceeds in the hands of the bank?

393. Suppose a farmer driving to market in an automobile runs over a pedestrian and injures him. Has the pedestrian a right to bring suit and attach the farm?

394. Suppose a husband deserts his wife and leaves her on the homestead premises where she continues to live. Have the husband's creditors a right to attach the property?

PART II

395. What is the essential difference between appurtenant and appendant?
396. What is the meaning of the word "appurtenant"?
397. What kind of rights can pass with land as appurtenant to it?
398. How can rights appurtenant to land be transferred?
399. Suppose a man owns a room in a building, and the building is destroyed. What is the effect on his interest in the room?
400. Can you think of any reason why aerolites belong to the owner of the land on which they fall?
401. What is petroleum oil in place in the soil? Does it pass with a grant of the land?
402. Suppose there is a cherry tree near the boundary line of two farms and the branches extend over from the property of A, on which the trunk is, to the property of B. What rights has B?
403. Suppose a tree grows on the boundary line. Who has a right to cut it down?
404. Into what classes are products of the soil divided?
405. When are natural fruits an interest in land, and when are they not?
406. When annual crops are ready for harvest, are they part of the land or not?
407. Do growing crops go with the land on the death of the owner, or are they personal property going to the executor?
408. When a farmer sells his farm, who is entitled to the crops growing on the farm which the seller planted?
409. Where the husband cultivated crops on the wife's land, to whom do the crops belong?
410. What is the meaning of the term "away-going crops"?
411. What rights has a trespasser in crops which he planted himself on property which does not belong to him?

412. Does a mortgage cover crops growing on mortgaged premises?
413. Suppose you were acting for a landowner who desired to reserve in his sale the trees on the property. How would you carry out his desire?
414. What is the effect of an oral sale of standing timber?
415. Explain the meaning of voluntary waste.
416. How does equitable waste arise?
417. What is the difference between the English and American rule as to waste?
418. Has a tenant of property any obligation in regard to its condition?
419. What is the liability of a tenant at will who allows a house to become out of repair through the action of the elements?
420. State when it may be waste to cut underbrush or small trees.
421. When would it be waste to cut a door in a house?
422. Suppose a tenant changes cultivated land to pasture land. Is this waste?
423. Suppose a tenant builds a shed for his automobile on the premises. Has he a right to remove it before his tenancy expires?
424. Suppose A takes a lease of an office on the twentieth story of an office building in Chicago and the building is burned. (a) What are his rights? (b) What would be his rights if the building were in London?
425. When is it waste to work a mine?
426. Suppose a mine has been opened up but the ore has never been sold. Is this an open mine so that the tenant can work it?
427. Suppose a shaft had been sunk and afterwards the owner filled it up and cultivated the land. Would the life tenant have a right to mine at this place?
428. What was the remedy, if any, at common law, for permissive waste of a tenant at will?
429. What precautions should the attorney of a buyer of real estate take as to the description of the property?
430. What is the distinction between a patent and a latent ambiguity?

431. What is the effect of a parol agreement between the parties as to their boundary?
432. How far is parol evidence competent to locate boundaries?
433. What is the purpose of some of the statutes as to boundaries?
434. Suppose one of the corners in a description is named as a great rock on the premises, and the distances given in the deed do not correspond. Which controls?
435. Under what circumstances would an artificial monument control a natural monument?
436. When does a line run to the center of a monument and when not?
437. If a line was said to run a certain number of feet from the side of a building, would you measure from the eaves or from the foundation wall?
438. Suppose a deed describes property as extending to a highway. Does this give the grantee title to the center of the highway or not?
439. What is the meaning of the expression "to a road and thence along the road"?
440. Where a street is laid along the edge of a lot wholly on the land of one owner, what is the effect of his deed bounding the land on the street?
441. What is the effect of a deed bounding land on a street not yet constructed?
442. Can title to land in a street pass as appurtenant to abutting land?
443. Suppose lots are described as abutting on a street which has been vacated by the city. Is such land included in a deed?
444. How far does title pass when land is bounded on an artificial stream?
445. What is the effect of raising or lowering artificially the level of a natural lake or pond?
446. How would you divide flats below high water mark between contiguous owners of the shore front where the shore line is badly indented?
447. What is a spurious easement?
448. What is the rule as to fencing on the prairies in the western part of this country?

449. Is there any obligation to fence by custom in this country?
450. Is a man bound to maintain a fence simply because he has kept it up for his own benefit for over twenty years?
451. Suppose A owns a farm and makes an agreement with his neighbor B to maintain a certain border stone wall between the two premises and then A sells to C. Is C bound to keep up the wall?
452. What is the rule as to cattle being driven along a highway? Is the owner of the abutting property bound to maintain a fence to keep them off?
453. What is the obligation of a railroad to maintain a fence?
454. Of what material may a fence be made?
455. What is the office of fence viewers?

PART III

456. What is the difference between a natural right and an easement?
457. What is the foundation of all rights by prescription in this country?
458. In what way is an easement of light different from ordinary easements?
459. In what case has an agreement to leave light for a window been implied in parts of this country?
460. State one reason why there is no right to light by prescription in this country.
461. State the right of the landowner to his air free from smell and noise.
462. What is the meaning of the expression "convenient place" as applied to the right to carry on an objectionable business?
463. Why is there any difference between the case where the nuisance invades a locality of dwelling houses and where the dwelling houses are built after the nuisance is created?
464. Suppose a man runs a tack factory in a place for a great many years and the neighborhood gradually builds up around him to residences. Finally A builds a house so close to the tack factory as to make the noise of the factory during the day unbearable. When does the right of prescription begin as against it?
465. Is it necessary to prove damages in order to maintain an action to prevent prescriptive rights from being acquired?
466. State some of the reasons why there is no prescriptive right in percolating water in this country.
467. Suppose a man digs a trench on his land for the express purpose of cutting off percolating water which would otherwise flow into his neighbor's well. He does this because he has had a quarrel with his neighbor about another matter. Is there any right of action?

468. Is there any action for interrupting an underground stream?
469. State the rights of landowners in surface water.
470. Suppose a man turns rain water from the roof of his house onto his neighbor's land. Has the neighbor any right to object? Why is not this treated like surface water?
471. What rights to use a stream have the riparian owners?
472. What effect has the custom of landowners as evidence of reasonable use of a stream?
473. What is the difference between the English and American rule as to the right to use water from a stream?
474. Does the practice of irrigation create a prescriptive right as against an upper riparian owner?
475. Describe the doctrine of prior appropriation and state where it is prevalent and why.
476. How far has a riparian owner a right to pollute a stream?
477. What rights have the riparian owners to cut ice?
478. How far has a landowner a right to have a building on his land supported by the adjoining land?
479. Is there a right of action where the only damage caused by the subsidence of the land through lack of support from the neighboring land is caused to the buildings and not to the land itself?
480. Is there any right of support in an abutter on the street against the municipality which owns the street?
481. Discuss the rights of the parties where there are three adjoining landowners, A, B, and C. B digs a mine on his property without causing any damage to A. Subsequently C also digs a mine and this withdrawal of support causes the land of A to fall in.
482. Suppose the excavation is made in September and the neighbor's land freezes up during the winter and does not begin to subside until the following spring. Is there any right of action in this case?
483. What is the rule of damages in case of damage caused by the withdrawal of subjacent support?
484. What effect does the existence of buildings have on the liability for subsidence?
485. What effect does negligence have on failure to support land?

486. Suppose a landowner in draining his land drains the subterranean soil under the plaintiff's land, which causes the plaintiff's land to subside. Has the plaintiff any right of action?
487. Suppose a landowner pumps quicksand from under his land and this causes the quicksand from his neighbor's land to run in and makes his neighbor's land subside. What is the liability?
488. Define an easement.
489. What kinds of easements are there?
490. Define an easement in gross.
491. When will a right of way be presumed to be in gross?
492. What are the requisites of a valid custom?
493. Why is it impossible to create an easement by custom in this country?
494. When can rights by prescription arise in this country?
495. What is a servient tenement?
496. Suppose a man has used a narrow way for driving pigs for over twenty years. Does this give him a right to drive cattle over the same land?
497. Suppose a man drives one horse along a way for twenty years. Does this give him a right to drive other horses along the same way?
498. If you wanted to obtain for your client a right of way over the land of another, in what language would you insist on having the grant read?
499. When does a right of way by necessity arise?
500. Who is bound to repair a way?
501. Has the landowner a right to put a gate in a right of way over his land?
502. Suppose you desired to obtain for your client a right to drain his land over the land of his neighbor. In what language would you have the right expressed?
503. What is the nature of the right to pond water?
504. Describe the Mill acts.
505. Suppose an owner has a right to have the eaves of his two-story frame house drip on the land of his neighbor. And suppose he tears down his house and builds a twenty-story office building, with eaves projecting the same dis-

tance as before. Has he still a right to have the eaves drip on his neighbor's land?

506. What is the nature of property in a pew in this country today?

507. Describe the nature of rights in cemeteries.

508. In what cases will an easement be held to be abandoned?

509. What is the effect of failure of the owner of a right of way to use it for twenty years?

510. Suppose a tenant under a lease acquires by prescription a right of way over the land of his neighbor. And suppose he then buys the neighbor's land. What is the effect of the right of way?

511. What is the difference between a license and an easement?

512. (a) Is a verbal permission by a lower proprietor of water to the upper owner to take more than his share of the water of any effect? (b) If so, why?

513. Suppose A buys hay of B. Has A any right to go on B's land and get the hay?

514. What is the difference between a license to do something on the land of the licensee and to do something on the land of the licensor?

515. When are licenses revocable and when not?

516. What is the difference between a profit and an easement?

517. Describe a common appendant and give its history.

518. Does a sale of an ice house carry as appurtenant to it the right to cut ice in the adjoining pond?

519. Name the four kinds of common of pasture at common law.

520. What is a common of piscary?

521. Can a right to dig coal be claimed by custom?

522. Describe a recent English case where a right to take fish by prescription by freeholders along a stream was claimed.

523. When can a right to fish be claimed by prescription?

524. Why cannot a profit in gross be divided?

525. What is the difference between the American and English rule as to ownership of land under a party wall?

526. Suppose A builds a party wall half on his own land and half on the land of his neighbor B. And then B builds a house on his side and uses the wall. Can A force B to pay for his share of the expense of the wall?

527. Can either party raise a party wall above its original height?
528. What is ground rent?
529. What is rent service?
530. Why is attornment now unnecessary in this country?
531. What was distress at common law?
532. What kind of covenants run with the land?
533. When did covenants first become assignable?
534. When will the heirs be bound on a covenant relating to something to be created in the future?
535. When was the heir bound by a covenant made by his ancestors at common law?
536. Suppose A grants land to B and covenants to pay B a certain sum of money. How far does this covenant run with the land?
537. What is the difficulty with the use of the word "privity" in law?
538. In what cases will the courts not enforce a covenant?
539. Give an example of an equitable easement.
540. Has A any rights where he conveys land to B on condition that B shall not use it except for small houses and B proposes to put up factories?

PART IV

541. State the five methods of granting property at common law.
542. State the origin of our modern deeds.
543. What was the effect of the Statute of Uses on deeds?
544. What kinds of estates were conveyed by special custom?
545. What is the origin of the expression "deed poll"?
546. What was the purpose of the ancient system of fines and recoveries?
547. What is the effect of the Statute of Uses on a deed of bargain and sale?
548. When can the existence of consideration for a deed be denied?
549. What statute required a signature to a deed?
550. What was the early custom as to sealing documents?
551. What was the Norman custom as to signing and sealing deeds?
552. (a) May one seal suffice for two signatures? (b) If so, when?
553. Is it sufficient to have a seal printed on documents ready for signing?
554. What is the historical reason why a seal implies consideration?
555. Is the use of a seal a valuable practice today?
556. Is a deed written on a shingle a valid deed?
557. What is the purport of the statutory requirements as to short forms of deeds?
558. Suppose the owner of land gives your client a deed with the date left blank and name of the grantee left blank, because the owner forgot to put in the date and did not know the name of the grantee. Would you advise your client to fill in these blanks and record the deed and pay for the property?
559. When was a deed of surrender necessary?

560. What is the effect of the acceptance by a tenant of a new lease of property?
561. Give an example of a surrender by operation of law.
562. Can there be a surrender by operation of law where there is a change of possession at the same time?
563. What is the effect of an oral surrender of a lease without change of possession?
564. Suppose there is a grant to A for life, remainder to B for a hundred years, remainder to C in fee. (a) Can A make a surrender to B? (b) If not, why not?
565. What is the effect of a contract to surrender a lease in the future?
566. Name the four kinds of releases at common law.
567. Suppose the owner of land has prepared a deed of it and executed the deed, when he is attacked by highwaymen and robbed of the deed, and the robber then records the deed. (a) Is it effectual to pass title? (b) If not, why?
568. What is the effect in this country of a statement by the grantor, "I deliver this as my act and deed," when the grantor then keeps the deed in his possession?
569. What is the meaning of the expression "delivery in escrow"?
570. Can a deed be delivered in escrow to the agent of a purchaser?
571. Under what circumstances may a delivery relate back to an earlier time?
572. Under what circumstances is it impossible for delivery to relate back to a period before the recording?
573. When is it a valid delivery to give a deed to a third person?
574. When will acceptance of a deed be presumed?
575. What effect does retention of control by the grantor have on the deed?
576. Suppose the owner of land executes a deed to his infant daughter and has it recorded and then keeps the deed in his own possession, never acquainting her with its existence. Is this deed properly delivered?
577. Suppose a deed is made to an infant six months old. Is it necessary to obtain acceptance by the infant to make the deed valid?
578. What is the meaning of execution of a deed?

579. What is the effect of a deed made by a lunatic?
580. What was the reason why a disseisee could at common law make no conveyance of property?
581. What was the meaning of the expression "inquest of office"?
582. Suppose the owner of land, A, makes a deed to A and B. What is the effect of this deed?
583. What is the effect of a lease of a right to fish not under seal?
584. Suppose a landowner grants an easement in a certain strip of land, and later makes a deed to another of the whole tract "except the strip of land heretofore deeded." What is the effect of this deed?
585. What qualifications should an attorney have to give an intelligent opinion as to the validity of title?
586. What is the purpose of abstract offices?
587. Suppose you found a deed in a chain of title signed by a man with no statement of dower and no statement whether he was married or unmarried. What would you advise your client to do in the matter?
588. Suppose one of the former owners of land, the title to which you were examining, had died and no probate had ever been taken out on his estate. What steps would you take to protect your client?
589. What liens besides mortgages must the abstracter guard against?
590. Suppose the abstracter of title makes a careful note of all conveyances and liens against the property. Suppose the title comes through foreclosure and the abstracter fails to note that the foreclosure notice did not state the place of the sale. Is he personally liable for any loss suffered by his client on account of it?
591. What were the five original covenants of title?
592. What is the effect of a warranty deed on title?
593. What is necessary for a perfect title?
594. What is the Massachusetts rule as to the effect of a covenant of seisin?
595. When is a covenant of the right to convey broken?
596. When does the Statute of Limitations run against a covenant against incumbrances?

597. What is the meaning of the word "incumbrances"?
598. When are easements regarded as incumbrances?
599. What is the measure of damages when the covenant against incumbrances is broken?
600. What is the rule of damages for the breach of the covenant for quiet enjoyment?
601. What is the effect of a covenant for further assurance?
602. What is a general covenant of warranty?
603. What effect did the Statute Quia Emptores have on warranties?
604. What effect does taking by eminent domain have on warranty?
605. What was the purpose of the doctrine of collateral warranty?
606. What is a constructive eviction?
607. Suppose A makes conveyance to B with a covenant of seisin and B dies devising the property by will to C. Suppose A did not have good title. What are the rights of C?
608. How far does the doctrine of continuing breach hold in this country?
609. What covenants run with the land and what do not?
610. What is the effect of releasing one in a line of covenantors?
611. Suppose A, a man of wealth, makes a deed to B, who deeds to C, who deeds to D, all with covenants of warranty. Suppose D comes to you for advice concerning a defect in his title. Whom would you advise him to sue?
612. What effect does a recovery against one in a chain of covenantors have on the others in general?
613. What is the American rule as to when covenants of warranty run with the land?
614. When will the burden of covenants run with the land in this country?
615. What is the measure of damages in case of a breach of a covenant of warranty?
616. When is adverse possession a breach of a covenant?
617. When will the burden of covenants running with the land be enforced in equity in this country?
618. When A, having no title, makes a deed of land to B and A subsequently buys the outstanding title from C, a third party, what are the rights of B against A?

619. In what cases will an estate pass by an estoppel by deed?
620. What is the meaning of the expression "feeding the estoppel"?
621. Suppose A makes a warranty deed to B and A never had either title or possession and B conveys to C. Does the doctrine of estoppel apply in favor of C as against A, if A buys the true title?
622. What is the object of the recording laws?
623. What is the duty of a register when an instrument is presented to him for record?
624. Who is responsible where there is an error made in recording an instrument by the recording officer?
625. What is the effect of an error in the grantor's middle name?
626. Suppose you wanted to introduce a record in evidence. How would you do it?
627. Suppose A makes a deed to B, which B fails to record, and subsequently A gives another deed of the same property to C, which is promptly recorded before the deed to B. Who has title to the property?
628. What is the meaning of the statement that the mortgagee is recorded as purchaser?
629. What is the origin of the Torrens System of Land Registration?
630. (a) Are the Torrens Acts generally constitutional? (b) If so, why?
631. What is the effect of the Torrens Acts?
632. Suppose you wanted to have a title registered for a client, how would you go about it?
633. In what cases are you most likely to resort to registration of title?
634. Can the court under the Torrens Acts register a defective title?
635. Consider some case which has come within your experience of a defect of record and state how the court will deal with it under the Torrens Acts.
636. When was the law of dedication first developed?
637. (a) Does dedication imply a grant? (b) If not, what is it?

638. Is it possible to dedicate a park to the public for a period of fifteen years?
639. For what purposes can dedication take place?
640. Under what sort of conditions may dedication be made?
641. Is it necessary to complete a dedication to show acceptance by the inhabitants?
642. How far can acceptance in this country be presumed by use by the public?
643. Describe the government methods of surveying townships.
644. What is a fractional section?
645. What rights does the buyer from the government have on land bordering on a river or stream?
646. What is the process of buying public land from the government?
647. What grants of land for educational purposes have been made by the government?
648. What is a power?
649. What is a general power?
650. Draw a deed giving a donee an exclusive power.
651. What is the effect of the Statute of Uses on powers?
652. Suppose A has a power to appoint by will. Can he exercise this power by deed during his life?
653. Can the survivor of donees of a power exercise it?
654. In what cases will general words in a will operate as an execution of the power?
655. What effect on the question of intention to exercise a power by general words in a will does the fact have that the donee is a life tenant of the property?
656. What effect on the exercise of a power by general words in a will does the ownership of other land by the donee have?
657. When will an excessive execution of a power be good up to the extent of its proper exercise?
658. Suppose there was a power of appointment given to be exercised among the children of A and the power is exercised between only two of A's three children. What is the effect of this appointment?
659. Suppose a man has the power to appoint by will and he does appoint by will which only has two witnesses when three witnesses are necessary. What is the effect of this?

660. What is an illusory appointment?
661. State a case where an appointment would be fraudulent.
662. What is the only ground on which an appointment can be attacked for fraud?
663. In what case can an abatement of the power to appoint occur?
664. What is the effect if the appointee dies before the power takes effect?
665. In what ways can a power be released?
666. In what way can a power appendant be released?
667. When can a collateral power be released and when not?
668. What is the English rule as to the release of a special power in gross?
669. What is the difference in the right to release between a power appendant and a power collateral?
670. State Professor Gray's doctrine as to release of special powers in gross.
671. What is the effect of an agreement by the donee of a testamentary power not to use it?
672. What country today has title to the north pole, and why?
673. Describe the power of eminent domain.
674. Is it possible to take an easement by eminent domain?
675. Suppose you were examining a title and one of the links in the chain of title was a tax sale. What steps would you take to satisfy yourself as to the validity of the tax sale?
676. What is the effect of a filing of a petition in bankruptcy on the title to land?
677. In what case has forfeiture of land for crime taken effect in this country?
678. For how long a term is confiscation for crime made?
679. When does title to the property forfeited for crime pass to the government?
680. Name the only case where forfeiture of title to real estate on account of crime takes place today.
681. State under what circumstances a levy takes place.
682. What proceedings should the appraisers take in connection with a sale on execution?
683. When is a memorandum of sale necessary?
684. Who have a right to bid at the sale?

685. When can a sheriff's deed be amended?
686. Who has a right to attack an execution sale and have it vacated?
687. In what cases will public policy forbid partition of property?
688. When was partition first provided by statute?
689. What is the meaning of the word "owelty"?
690. Discuss the doctrine of lost grant.
691. Is it necessary as a basis to title by adverse possession that the claimant should claim his title in good faith?
692. Is ignorance of the owner of the occupation by the claimant a defense to title by adverse possession?
693. What is the effect on the right by prescription to use a drain of the acts of the dominant tenant in deepening and enlarging it?
694. How far does the doctrine of lost grant apply to the acquiring of easements by prescription?
695. What defenses can the owner of land make against the acquiring of easement by prescription over it?
696. State the doctrine of constructive possession under color of title.
697. What effect does bad faith have on constructive possession?
698. How far must possession under color of title be hostile to the true owner in order to serve as the basis for title by adverse possession?
699. What limitation has been placed on the doctrine of constructive possession in this country?
700. Can adverse possession be founded on an entry under a deed only on that portion of the land which the grantor actually owned?
701. What priorities exist among successive occupiers under color of title?
702. Can title by constructive possession arise through occupation by an agent?
703. What is the effect of building a house close to the border line so that the eaves overhang?
704. How can the squatter who has acquired title by twenty years' possession sell his title?
705. Explain the meaning of the expression "disseisin by election."

706. Why will not the Statute of Limitations run in favor of a grantee holding possession under an unrecorded deed?
707. Can a wife obtain title to her husband's property by adverse possession?
708. When does the statute begin to run against a vested remainder?
709. How far will an unauthorized claim of the lessee under a lease for years give him a title by prescription?
710. How far can a grantee in a deed made without authority by a lessee obtain title by adverse possession?
711. How far would the principles of adverse possession apply in a boundary dispute between two states?
712. Can land be taken from a municipal corporation through adverse possession for a statutory period?
713. Can you state a case where a city might be estopped from claiming title to land?
714. Will the rule of tacking adverse possessions apply where there has been an oral transfer between two squatters?
715. Suppose pasture land is used by a squatter to pasture his cattle, but before the statutory period expires the true owner goes on the land and drives off the squatter's cattle and keeps them out for a week, when the squatter resumes possession. Does the squatter then have title at the end of the statutory period?
716. Suppose in the case stated in the previous question, that the true owner simply made angry protests and objections, but never went on the premises. What would the result be in that case?
717. Can a lessee of property interrupt the running of the prescriptive period against the owner by any acts on his part?
718. Suppose an estate is granted to A for life, remainder to B in fee, and suppose during A's life C begins to walk over the land and keeps on walking after the remainder vests. And suppose when A dies B is an infant. How soon will B's rights be barred?
719. Suppose A is squatting on the land of B, who dies leaving as his heir his infant son one year old, named C. How soon will C be barred by adverse possession?
720. Define the difference between accretion and reliction.
721. What is the test of alluvion?

722. Suppose land under water can still be identified. What rights has its former owner?
723. State some of the reasons for the rule as to acquisition of property by accretion.
724. What is the nature of the right to alluvion?
725. Does the fact that alluvion is caused by artificial structures make any difference in the rule?
726. Suppose there is an island in the Mississippi River owned by A and B equally and they own the shore on the opposite sides of the island. Suppose the island, through the action of the river, changes its location so as to be joined to the mainland belonging to A. What effect does this have on the title?
727. Suppose the river cuts through A's farm, leaving a portion of the farm on the opposite side of the river. What effect does that have on A's title?
728. Suppose a mill pond has been in existence for forty years when the conditions change and it becomes unprofitable to run the mill, and the pond is drained. Who owns the land where the pond formerly was?
729. State some of the rules for dividing flats.
730. Suppose a city lays out a street running to a river and the street is laid out by a careful survey with definite monuments. Then the river changes its course over a hundred yards away from the street. What effect does this have?
731. State some of the authorities on the law of real property.

TABLE OF CONTENTS

LEADING ILLUSTRATIVE CASES
LAW OF REAL PROPERTY

(The figures refer to those at the foot of the pages. All Leading Illustrative Cases cited in the text are included in the following chapters.)

PART I.

NATURE OF OWNERSHIP IN LAND.

CHAPTER I.

ORIGIN AND TERMINOLOGY OF RIGHTS IN LAND.

TITLE OF CASE — PAGE

Digby, History of Real Property, App. to Part I..... 591

CHAPTER II.

REAL AND PERSONAL PROPERTY DISTINGUISHED.

Jenkins v. McCurdy..... 593
Mott v. Palmer..... 594
Snow v. Smith..... 598
Nason v. Tobey..... 600

CHAPTER V.

SOURCES OF TITLE IN THIS COUNTRY.

Van Rensselaer v. Hays..... 602
Johnson v. McIntosh..... 603

CHAPTER VII.

SEISIN AND LIVERY OF SEISIN.

TITLE OF CASE	PAGE
Leake, Digest of Land Law, 46-48	613
Hargrave's Note	615
Littleton, § 59	615

CHAPTER X.

FEE SIMPLE.

Littleton, §§ 1, 2	617
Smith v. Kimball	618

CHAPTER XI.

DETERMINABLE OR BASE FEE.

Ahlfield et al. v. Curtis et al	625
Christopher Corbet's Case	627

CHAPTER XII.

ESTATES TAIL.

Littleton, §§ 13-19, 21-24	629
Lehndorf v. Cope	631

CHAPTER XIII.

RULE IN SHELLEY'S CASE.

Steele et al. v. Smith et al	637

CHAPTER XIV.

LIFE ESTATES.

Jenks v. Horton	643

CHAPTER XV.

RESTRAINTS ON ALIENATION.

TITLE OF CASE PAGE
Blackstone Bank v. Davis..... 647
Nichols v. Eaton..... 648

CHAPTER XVI.

CONDITIONS.

Cowell v. Colorado Springs Co..... 656

CHAPTER XVII.

USES.

Bacon, Uses, 22..... 662
Leake, Digest of Land Law, 112, 113..... 662
Jordan et al. v. Phillips & Crew Co. et al..... 663

CHAPTER XVIII.

EQUITABLE CONVERSION.

Curteis v. Wormald..... 667
Swisher v. Swisher et al..... 670

CHAPTER XIX.

REMAINDERS AND REVERSIONS.

Akers v. Clark et al..... 672
Golladay et al. v. Knock et al..... 674

CHAPTER XXI.

CONDITIONAL LIMITATIONS—EXECUTORY DEVISES—SHIFTING AND SPRINGING USES.

Proprietors of the Church in Brattle Square v. Grant et al. 682

CHAPTER XXVI.

THE RULE AGAINST PERPETUITIES APPLIED TO POWERS.

TITLE OF CASE PAGE
Brown et al. v. Columbia Finance & Trust Co..... 699

CHAPTER XXVIII.

CO-TENANCY IN GENERAL.

Thornburg v. Wiggins..... 705

CHAPTER XXIX.

TENANCY IN COMMON.

Carver v. Fennimore..... 713

CHAPTER XXXI.

COPARCENARY.

Littleton, §§ 241 et seq..... 718

CHAPTER XXXII.

ESTATES ARISING BY MARRIAGE IN GENERAL.

Douglas v. Douglas et al..... 719

CHAPTER XXXIII.

CURTESY.

Bragg v. Wiseman et al..... 727

CHAPTER XXXIV.

DOWER.

House v. Jackson..... 730
Dunbar v. Dunbar et al..... 732
In Re Rausch..... 739

CHAPTER XXXV.

HOMESTEAD EXEMPTIONS.

TITLE OF CASE PAGE
Bell v. Carter..... 741

PART II.

USE AND ENJOYMENT INCIDENT TO OWNERSHIP OF LAND.

CHAPTER XXXVI.

RIGHTS APPURTENANT TO LAND.

Rupel et al. v. Ohio Oil Co. et al..... 746

CHAPTER XXXVII.

FRUITS OF THE SOIL.

Reiff v. Reiff..... 751
Cockrill v. Downey..... 752

CHAPTER XXXVIII.

WASTE.

Duncombe v. Felt..... 754

CHAPTER XXXIX.

BOUNDARIES.

Pratt v. Quirk et al.....759

CHAPTER XL.

FENCES.

Mullen v. Renzleman..... 763

PART III.

USE AND ENJOYMENT OF LAND OF ANOTHER.

CHAPTER XLI.

NATURAL RIGHTS TO AIR AND WATER.

TITLE OF CASE	PAGE
Gose v. Coryell	768
Huntington v. Asher	776

CHAPTER XLII.

LATERAL AND SUBJACENT SUPPORT.

Moellering v. Evans 778

CHAPTER XLIII.

EASEMENTS.

Goldman v. Beach Front Realty Co 783

CHAPTER XLIV.

LICENSES.

Wood v. Leadbitter 786

Johnson v. Bartron 791

CHAPTER XLV.

PROFITS.

Hall v. Lawrence 793

CHAPTER XLVII.

RENT.

Littleton, § 551 801

CHAPTER XLVIII.

COVENANTS RUNNING WITH LAND.

TITLE OF CASE PAGE
Supplee et al. v. Cohen et al. 803

PART IV.

ACQUISITION OR TRANSFER OF TITLE.

A. DURING LIFE WITH CONSENT OF OWNER

CHAPTER XLIX.

FORMS OF CONVEYANCES.

Minneapolis v. Hughes et al. 808

CHAPTER L.

SURRENDER AND RELEASE.

Auer v. Penn 813

CHAPTER LI.

DELIVERY AND ACCEPTANCE.

Cook v. Brown 816
Alabama Coal & Coke Co. v. Gulf Coal & Coke Co 822

CHAPTER LIV.

COVENANTS OF TITLE.

Cole v. Kimball 825
Joiner et al. v. Ardmore Loan & Trust Co 828

CHAPTER LV.

RECORDING LAWS.

Hooper v. Leavitt 836

CHAPTER LVI.

TORRENS SYSTEM OF LAND REGISTRATION.

TITLE OF CASE PAGE
Peters v. Duluth et al. 844

CHAPTER LVII.

DEDICATION.

Ellis et al. v. Hazelhurst. 855
Douglass v. Belknap Springs Land Co. et al. 858

CHAPTER LIX.

POWERS.

Coates v. Lunt et al. 864
Langley v. Conlan et al. 867

B. DURING LIFE WITHOUT CONSENT OF OWNER

CHAPTER LX.

IN GENERAL.

Oregon Short Line R. R. Co. v. Hallock et al. 870

CHAPTER LXII.

SALES ON EXECUTION.

Keaton v. Farkas. 876

CHAPTER LXIV.

ADVERSE POSSESSION.

Locklear v. Savage et al. 879
Clinchfield Coal Co. et al. v. Viers. 883

CHAPTER LXV.

ACCRETION, ALLUVION AND RELICTION.

Freeland et al. v. Pennsylvania R. R. Co. 884

LEADING ILLUSTRATIVE CASES LAW OF REAL PROPERTY

PART I

NATURE OF OWNERSHIP IN LAND

CHAPTER I.

ORIGIN AND TERMINOLOGY OF RIGHTS IN LAND.

Corporeal and Incorporeal Hereditaments.

DIGBY, HISTORY OF REAL PROPERTY.

App. to Part I. (11) Note.

"The division of hereditaments into corporeal and incorporeal, though deeply rooted in our legal phraseology, is most unfortunate and misleading. The confusion is inherited from the Roman lawyers (see Justinian, Inst. ii. tit. 2), but has been made worse confounded by our own authorities. The Romans, misled by the double sense of *res*, unhappily distinguished *res corporales* and *res incorporales*, the former being things which can be touched, heard, and seen, the latter mere rights at law. It is obvious that this is mere confusion, the two ideas not being capable of being brought under one class, or of forming opposite members of a division. Following the Romans, our lawyers distinguished between hereditaments as meaning the actual corporeal land itself, and another kind of hereditaments as not being the land itself, but 'the rights annexed to or issuing out of the land.' A moment's reflection is sufficient to show that the distinction is untenable. The lawyer has nothing whatever to do with the material corporeal land, except so far as it is the subject of rights. It is the distinction between different

classes of rights, and not between land on the one side and rights on the other, that he is concerned with. In such phrases as 'the land descends to the heir,' what is meant is, not that something happens to the land itself, but that a particular class of the ancestor's rights in relation to the land descends to the heir. The names 'corporeal and incorporeal' are most unfortunate, because if by 'corporeal' is meant 'relating to land,' then a large class of incorporeal hereditaments are also entitled to the name; if by 'incorporeal' is meant that they are mere rights, then all hereditaments are incorporeal, because the lawyer is only concerned with different classes of rights. In reality, however, it appears that the names point to different classes of rights; and in fact, Stephen in his edition of Blackstone, 5th ed., vol. i. p. 656, almost confines incorporeal hereditaments to *jura in alieno solo*. See Austin, vol. ii. pp. 707, 708."

CHAPTER II.

REAL AND PERSONAL PROPERTY DISTINGUISHED.

In General.

JENKINS v. McCURDY.

48 Wis. 628, 4 N. W. 807. 1879.

ORTON, J. This action is brought to enjoin the defendant from entering upon the lands of the plaintiffs and removing earth or certain filling material, which had become part of the soil, and for the value of such material which has been thus removed. The defendant, by his answer, admits his entry upon the lands of the plaintiffs and removal of certain material therefrom, which he insists had not become a part of the soil or attached to the freehold, but consisted of fire-wood, piled up and so placed upon the premises as to be personal property, and that he was the owner of the same, and had the right to so enter upon the premises of the plaintiffs and remove it. This case involves the small amount of about nine dollars, and only one question, which is a mixed one of law and fact, and depends entirely upon the facts in proof, and will therefore be but briefly considered.

It appears that the plaintiffs purchased the premises of one Thompson; that at that time the material in question was upon the surface of the soil, either as fire-wood or filling; and that afterward Thompson sold said material to the defendant, and the defendant entered the premises and removed a part of such material therefrom. The character of this material in its nature and uses, its situation upon the land as being actually and physically attached or detached, and the intention of the owner when it was so placed in respect to its use, are questions of fact necessary to be considered in determining the question of law as to whether this material had become a part of the realty, and passed by deed to the plaintiffs, or whether it was personal and movable property, and was sold to the defendant, and he thereby became the owner. The facts agreed upon, the question

of law is neither difficult nor doubtful. That which is in its nature otherwise personal, when physically attached to the soil, or constructively attached by its use or intended use with the soil, will pass with the title of the realty: Tyler on Fixtures, 59, 116; Ewell on Fixtures, 31; Conklin v. Parsons, 2 Pinney, 264.

The only question in this case is, Does the evidence show the material to have been "slabs, sawdust, shavings, and other refuse matter" used to fill up low and marshy ground near the mill, as claimed by the plaintiffs, or slabs and pieces of lumber suitable for firewood, and piled up on the premises and intended to be used and removed as such? On this question depends the legal conclusion that the material in question is, or is not, personal or real property; and on this question the evidence is conflicting and contradictory. The Circuit Court found that the facts justified the conclusion that the material was personal property and belonged to the defendant, and made a special finding of the facts upon which such conclusion was based. Against these findings there does not appear such a clear preponderance of the evidence as would warrant us in reversing them: Green v. Feil, 41 Wis. 620, and numerous other cases in this Court, and make this the true test for the exercise of this right by this Court.

BY THE COURT.—The judgment of the Circuit Court is affirmed, with costs.

Whether Fence Is Personal Property—House, and Room in House.

MOTT v. PALMER.

1 N. Y. 564. 1848.

RUGGLES, J. In December, 1841, Mott conveyed to Palmer a farm of land in Columbia County by a deed containing the following covenant:

"And the said Philander Mott doth hereby covenant and agree that at the delivery hereof he is the lawful owner of the premises above granted, and seized of a good and indefeasible estate of inheritance therein clear of all incumbrance."

This action was brought by Palmer, the grantee, on the covenant in the deed, to recover the value of a rail fence which

stood on the land when the deed was executed, but which did not belong to Mott the grantor. The facts were, that the fence was erected on Mott's land in 1840 by one Brown (who owned the adjoining land), under an agreement between him and Mott, by which Brown was to fence in, temporarily, a part of Mott's land with his own, and to cut and take away the grass growing on Mott's land; with leave to take away the fence whenever he liked. After Mott conveyed to Palmer the land on which the fence stood, Palmer removed the fence and converted it to his own use. Brown thereupon sued him before a justice for the fence and recovered, Mott being a witness on that trial against Palmer. Although the evidence to prove these facts was at first offered by Palmer on the trial of this cause in the Court below and rejected by the Court, it was afterward given by the defendant Mott.

The question now is whether in this action brought by Palmer the grantee against Mott his grantor, on the covenant of ownership and seisin in the deed, Palmer is entitled to recover the value of the fence. A grantor who executes a conveyance of land undertakes to convey everything described in his deed; and by a covenant of seisin he assumes to be the owner of all he undertakes to convey. The deed in question purported to "grant and convey all that certain lot or farm of land situate in the town of Chatham, County of Columbia, bounded, etc., with the appurtenances," etc. The word land, when used in a deed, includes not only the naked earth, but everything within it, and the buildings, trees, fixtures, and fences upon it: Goodrich v. Jones, 2 Hill, 143; Walker v. Sherman, 20 Wend. 639, 640, 646; Green v. Armstrong, 1 Denio, 554; Com. Dig. Grant, E.; Co. Litt. 4 a; 2 Roll. 265. A deed passes all the incidents to the land as well as the land itself, and as well when they are not expressed as when they are. Fixtures belonging to the owner of the land, being part of the land, cannot be reserved by parol when the land is conveyed; the deed conveys them to the grantee unless the reservation be in writing: Noble v. Bosworth, 19 Pick. 314. If the fence had belonged to Mott, it would have passed by his deed; not by force of the word appurtenances contained in the deed, but without that word, and as part of the land. Trees, buildings, fixtures, and fences on a farm, are corporeal in their nature, and the subjects of seisin,

like the land itself of which they are regarded in the law as a part. Fences are perishable by the effect of time, and so are trees and houses; but indestructibility is not one of the essential attributes of real estate. Fences are not only indispensable to the enjoyment of real estate, but they are, in their nature, real estate, to the same extent that houses and other structures on the land are so. A rail, before it is used in the construction of a fence, is personal property, and so is a loose timber before it is used in the construction of a house. When either is applied to its appropriate use in building a fence or a house, its legal nature is changed. It becomes real estate, and is governed by the law which regulates land, descending to the heir as part of the inheritance, and passing by a deed as part of the freehold. A fence may be easily detached from the earth, but not more easily than the stones which lie on its surface, and both are part of the land, and, therefore, it is that a building or fence belonging to the owner of the land will pass by his deed of the land without being expressed or designated as part of the thing granted.

But the earth within specified boundary lines may be owned by one man, and the buildings, trees, and fences standing on it by another. A man may have an inheritance in an upper chamber, although the title to the lower buildings and soil be in another: Shep. Touch. 206; 1 Inst. 48, b. And it is a corporeal inheritance: 10 Vin. 202. Buildings and fixtures erected by a tenant for the purposes of trade belong to him, and are removable without the consent of his landlord: Holmes v. Tremper, 20 John. 30; Miller v. Plumb, 6 Cowen, 665; Doty v. Gorham, 5 Pick. 489. Herlakenden's Case, 4 Co. R. 63, affords an instance in which one man owned the land and another the growing trees upon it. In Rogers v. Woodbury, 15 Pick. 156, Putnam, J., in speaking of a house which a man had erected on land which did not belong to him, said "it might or it might not be parcel of the realty. If the owner of the land owned the buildings, it would be so. If he did not, and the owner of the building had no interest in the land, the building would be personal property." Smith v. Benson, 1 Hill, 176, was the case of a dwelling-house and grocery belonging to one man, although standing on the land of another; and in Russell v. Richards, 1 Fairf. 431, the owner of land on which another

man had erected a saw-mill by his consent, executed a deed for the land and the mill, but it was held that the conveyance passed no title to the mill, because it was the property of him who built it. The conclusion derived from these cases against the plaintiff's right of recovery on the covenant is that the defendant's deed purports to be a grant of real estate only, and the fence in question being personal property was not a part of the premises granted, and therefore not within the scope of the covenant which relates to the realty only.

If this be a sound conclusion, a grantor could not be made liable on the covenants in his deed, although he had previously and privately sold, with a view to removal, all the houses, buildings, mills, fences, and growing timber on the land conveyed. Indeed, if this doctrine prevails, the gravel, clay, stone, and loam might also be converted into personal property by such a sale, and carried off the land, without violating the grantor's covenant. Let us test the correctness of this conclusion in a few words. It is true the fence in one sense was not a part of the thing granted. It did not pass by the deed. In the same sense, if some stranger had been the owner of one-half of the farm, the half would not have been part of the thing granted because it would not have been passed by the deed. But the fence was *within the description* of the thing granted as clearly as the land itself; and being within the description, it was a part of that which the deed purported to convey, and of which the grantor covenanted that he was the owner. If it be yet doubted whether the fence (being in fact the personal property of Brown) was within the description of what the grantor professed to convey, that doubt can be solved in a moment, by reflecting that it would undeniably have passed by the deed if the grantor had been the owner of it; although it could not have so passed if it had not been within the description.

It all comes to this: The grantor undertook to convey it as part of the realty by a deed which would have been effectual for that purpose if he had been the owner of it, as by the deed he professed to be, but was not. It is therefore a case in which the covenant of seisin affords a remedy; and although the amount in controversy is trifling, the right is clear; and it seems to be perfectly just that the grantor should pay for the fence, because there is nothing in the case to show that Palmer, when

he accepted the deed, was informed by Mott or otherwise knew that it belonged to Brown.

The judgment of the Supreme Court must therefore be affirmed.

Machinery as a Fixture.

SNOW v. SMITH.

86 Vt. 58, 83 Atl. 269. 1912.

POWERS, J. In the fall of 1904, the orator leased to Harry T. Cushman for a term of 50 years a part of the pasture on his farm in Bennington. The lease was in writing, and, among other things, provided that the lessee might take and remove all ores and minerals lying in or upon the premises, that he might erect such buildings as might be necessary for the proper conduct of the business, that he should pay a certain rent as therein specified, and, after the first year, a certain sum per ton for all ore taken in excess of 150 tons, that he should deliver up the possession at the expiration of the term "without let or hindrance," and that, in case he should for a period of 30 days fail to perform any of his agreements as contained in the lease, the orator might forthwith "re-enter upon and repossess the premises." Cushman took possession under the lease and erected the buildings and installed the machinery, the removal of which the orator seeks by these proceedings to restrain. A shaft was sunk some 37 feet and from this, at various depths, drifts were extended in different directions. One of the buildings stands over this shaft, and it is in this building that the machinery is installed. The buildings are cheap, wooden structures, and they and the machinery were designed solely for mining purposes and were of little value for other purposes. All the machinery except a dryer can be removed without injury to itself or the building, and the buildings can be removed without material injury either to themselves or to the land.

The defendants have succeeded to Cushman's rights under the lease. The orator says, and his statement is not disputed, though the master's report does not show it, that one installment of rent was due when this suit was begun, but it was not 30 days overdue when it was paid by the solicitor for the defendants, and no re-entry was attempted. When this suit was brought and the

temporary injunction issued, the defendants were engaged in the removal of the buildings and machinery, and they admit that they do not intend to continue mining operations on the premises. Since these buildings and the machinery therein were placed upon the rented premises to advance the business for which the premises were leased, they must be held to be trade fixtures, and so removable by the tenant within the term. Updegraff v. Lesem, 15 Colo. App. 297, 62 Pac. 342; Conrad v. Saginaw Mining Co., 54 Mich. 249, 20 N. W. 39, 52 Am. Rep. 817.

It was said in Wagner v. C. & T. R. Co., 22 Ohio St. 563, 10 Am. Rep. 770, that the general principle involved in a determination of such questions is the distinction between the business which is carried on in or upon the premises and the premises themselves. That the former is personal in its nature, and articles that are merely accessory to the business and have been put on the premises for this purpose retain the personal character of the principal, to which they are subservient. But articles which have been annexed to the premises as accessory to the land, without regard to the business there carried on, become subservient to the realty and acquire its character. A leading case upon this subject is Van Ness v. Pacard, 2 Pet. 137, 7 L. Ed. 374. It is held therein that the question of the removability of fixtures erected by a tenant depends solely upon whether they were designed for the purposes of trade or not. This being so, the size, quality, and character of a building and the manner in which it is attached to the realty are of little or no consequence except as evidence bearing upon the purpose of its erection. That this property, both buildings and machinery, are trade fixtures is, in effect, conceded by the orator. He denies, however, that they can be removed by the tenant, and bases his denial on two grounds: First, because he would suffer great and disproportionate damage from the removal of the building over the shaft, since his cattle would be exposed to the dangers incident to the hole thereby left unguarded. Second, because he would be left without any security for the rent as it accrues in the future, and that he therefore ought to be decreed to have an equitable lien on the property.

The orator's first claim takes no note of the finding of the master that the buildings can be removed without material injury to the real estate. And we cannot say that this is not so,

for the open shaft and its dangers are only the indirect result of the removal of the building. The removal itself cannot injure the land. The condition thereby exposed can be easily guarded against as shown by the report. These came from a legitimate use of the demised premises, both as to the sinking of the shaft and the removal of its covering erected by the orator's express permission, and, if the orator had wished to avoid this result, he should have stipulated against it in the lease.

The orator's other claim is equally unsustainable. It may or may not be true that he will be unable to collect his rent in the future. The report does not show. It is not quite fair to say, as the orator does, that the defendants have abandoned the premises. They have stopped mining thereon, and that permanently, but there is no finding that they intend to abandon their rights. At any rate, we can establish no lien here, for neither the law nor the contract provides for one. We have no landlord's lien in this state.

Equitable liens are recognized, but these, says Mr. Pomeroy, have their foundation "in contracts, express or implied, which deal with, or in some manner relate to, specific property, such as a tract of land, particular chattels or securities, a certain fund, or the like." 3 Pom. Eq. § 1235. Here the buildings and machinery were not the subject-matter of any contract, express or implied. Again in Green v. McDonald, 75 Vt. 93, 53 Atl. 332, it was said that to raise an equitable lien the aid of a court of equity must be requisite to the owner of the property on which an equitable lien is sought, so that he may be compelled to do equity, or there must be some element of fraud in the matter as a ground of equitable relief. Here the owner is not seeking the aid of the court of equity, nor can it be charged that he has been guilty of anything resembling fraud toward the orator.

Affirmed and remanded. All concur.

Manure as Real Estate.

NASON v. TOBEY.

182 Mass. 314, 65 N. E. 389. 1902.

HOLMES, C. J. This is an action for the conversion of some manure, brought by an outgoing tenant against his landlord. On the plaintiff's testimony he had piled up in the cellar of the

barn and outside, when he left, thirty-five cords of manure, two cords of which he purchased, and the rest of which was made during his tenancy, more than half, it would seem, at the lowest estimate, from hay and grain bought by him. The plaintiff was engaged in the milk business and seems to have had more cattle on the farm than it could have supported. When he undertook to treat the manure as his own, the defendant claimed it and forbade him to sell it. At the trial the presiding justice ordered a verdict for the defendant, and the plaintiff excepted. We are of opinion that the exceptions must be sustained. Undoubtedly manure made in the ordinary course of husbandry belongs to the landlord. Daniels v. Pond, 21 Pick. 367, 32 Am. Dec. 269. And it may be that under some circumstances it would belong to him, even if made from hay furnished by the tenant. Lassell v. Reed, 6 Greenl. 222; Lewis v. Lyman, 22 Pick. 437, 442. But when animals are collected on land in excess of the number which it is capable of supporting, and they are kept there and fed upon purchased food for some other purpose than as incident to agriculture, a different rule applies. Pickering v. Moore, 67 N. H. 533, 32 Atl. 828, 31 L. R. A. 698, 68 Am. St. Rep. 695; Gallagher v. Shipley, 24 Md. 418, 429, 87 Am. Dec. 611. See Fay v. Muzzey, 13 Gray, 53, 56, 74 Am. Dec. 619 (2); Fletcher v. Herring, 112 Mass. 382, 384. It may be that if a question of apportionment were before us, it would be proper to take into account, on the defendant's side, that the milk sold from the farm was a substantial drain on the land, but we have to consider only whether it appears that the plaintiff could recover nothing, as matter of law. On the facts stated he had a right, if not to the whole pile of manure, to some ascertainable proportion of it which could be measured off to him. The defendant prevented him from taking any part, and claimed the whole. It was going too far to say that the plaintiff could recover nothing. Pickering v. Moore, 67 N. H. 533, 536, 32 Atl. 828, 31 L. R. A. 698, 68 Am. St. Rep. 695.

Exceptions sustained.

CHAPTER V.

SOURCES OF TITLE IN THIS COUNTRY.

American Law Evolved From the English Law.

VAN RENSSELAER v. HAYS.

19 N. Y. 68, 73. 1851.

Our ancestors, in emigrating to this country, brought with them such parts of the common law and such of the English statutes as were of a general nature and applicable to their situation (1 Kent, 473, and cases cited in note a to the 5th ed.; Bogardus v. Trinity Church, 4 Paige, 178); and when the first Constitution of this state came to be framed, all such parts of the common law of England and of Great Britain and of the acts of the Colonial Legislature as together formed the law of the Colony at the breaking out of the Revolution, were declared to be the law of this state, subject, of course, to alteration by the legislature. (Art. 35.) The law as to holding lands and of transmitting the title thereto from one subject to another must have been a matter of the first importance in our colonial state; and there can be no doubt but that the great body of the English law upon that subject, so far as it regarded the transactions of private individuals, immediately became the law of the colony, subject to such changes as were introduced by colonial legislation. The lands were holden under grants from the Crown, and as the king was not within the statute Quia emptores, a certain tenure, which, after the act of 12 Charles II. (ch. 24) abolishing military tenures, must have been that of free and common socage, was created as between the king and his grantee. I have elsewhere expressed the opinion that the king might, notwithstanding the statute against subinfeudation, grant to his immediate tenant the right to alien his land to be holden of himself, and thus create a manor, where the land was not intenure prior to the 18th Edward I. (The People v. Van Rensselaer, 5 Seld. 334.) But with the exception of the tenure arising upon royal

grants, and such as might be created by the king's immediate grantees under express license from the Crown, I am of opinion that the law forbidding the creating of new tenants by means of subinfeudation was always the law of the Colony, and that it was the law of this state, as well before as after the passage of our act concerning tenures, in 1787. A contrary theory would lead to the most absurd conclusions. We should have to hold that the feudal system, during the whole colonial period and for the first ten years of the state government, existed here in a condition of vigor which had been unknown in England for more than three centuries before the first settlement of this country. We should be obliged to resolve questions arising upon early conveyances, under which many titles are still held, by the law which prevailed in England during the first two centuries after the Conquest, before the commencement of the Year Books, and long before Littleton wrote his Treatise upon Tenures. See Gray, Perpetuities, §§ 22-28.

Sources of Title in This Country. Indian Titles.

JOHNSON v. McINTOSH.

8 Wheat. 543 (U. S.). 1823.

Error to the district court of the United States for Illinois.

It was an action of ejectment for lands in that district. The plaintiffs claimed under a purchase and conveyance from certain Indian tribes; the defendant, under a patent from the United States. In the court below judgment was rendered in favor of the defendant upon a case stated. The case found in detail many facts, mostly of a public nature, which it is not deemed necessary to detail; such of them as are material appear in the opinion of the court. * * *

MARSHALL, C. J. The plaintiffs in this cause claim the land, in their declaration mentioned, under two grants, purporting to be made, the first in 1773, and the last in 1775, by the chiefs of certain Indian tribes, constituting the Illinois and the Piankeshaw nations; and the question is, whether this title can be recognized in the courts of the United States.

The facts, as stated in the case agreed, show the authority of

the chiefs who executed this conveyance, so far as it could be given by their own people; and likewise show that the particular tribes for whom these chiefs acted were in rightful possession of the land they sold. The inquiry, therefore, is, in a great measure, confined to the power of Indians to give, and of private individuals to receive, a title which can be sustained in the courts of this country. * * * .

On the discovery of this immense continent the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.

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The exclusion of all other Europeans necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented.

Those relations which were to exist between the discoverer and the natives were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.

In the establishment of these relations the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They

were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle that discovery gave exclusive title to those who made it.

While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil while yet in possession of the natives. These grants have been understood by all to convey a title to the grantees, subject only to the Indian right of occupancy.

The history of America, from its discovery to the present day, proves, we think, the universal recognition of these principles. * * *

Thus has our whole country been granted by the crown while in the occupation of the Indians. These grants purport to convey the soil as well as the right of dominion to the grantees. In those governments which were denominated royal, where the right to the soil was not vested in individuals, but remained in the crown, or was vested in the colonial government, the king claimed and exercised the right of granting lands, and of dismembering the government, at his will. The grants made out of the two original colonies, after the resumption of their charters by the crown, are examples of this. The governments of New England, New York, New Jersey, Pennsylvania, Maryland, and a part of Carolina, were thus created. In all of them the soil, at the time the grants were made, was occupied by the Indians. Yet almost every title within those governments is dependent on these grants. In some instances the soil was conveyed by the crown unaccompanied by the powers of government, as in the case of the northern neck of Virginia. It has never been objected to this, or to any other similar grant, that the title as well as possession was in the Indians when it was made, and that it passed nothing on that account.

These various patents cannot be considered as nullities; nor can they be limited to a mere grant of the powers of govern-

ment. A charter intended to convey political power only would never contain words expressly granting the land, the soil, and the waters. Some of them purport to convey the soil alone; and in those cases in which the powers of government, as well as the soil, are conveyed to individuals, the crown has always acknowledged itself to be bound by the grant. Though the power to dismember regal governments was asserted and exercised, the power to dismember proprietary governments was not claimed; and, in some instances, even after the powers of government were revested in the crown, the title of the proprietors to the soil was respected. * * *

The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty as the circumstances of the people would allow them to exercise.

The power now possessed by the government of the United States to grant lands resided, while we were colonies, in the crown, or its grantees. The validity of the titles given by either have never been questioned in our courts. It has been exercised uniformly over territory in possession of the Indians. The existence of this power must negative the existence of any right which may conflict with and control it. An absolute title to lands cannot exist, at the same time, in different persons, or in different governments. An absolute must be an exclusive title, or at least a title which excludes all others not compatible with it. All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy, and recognize the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians.

We will not enter into the controversy whether agriculturists, merchants, and manufacturers have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits. Conquest gives a title which the courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice

of the claim which has been successfully asserted. The British government, which was then our government, and whose rights have passed to the United States, asserted a title to all the lands occupied by Indians, within the chartered limits of the British colonies. It asserted also a limited sovereignty over them, and the exclusive right of extinguishing the title which occupancy gave to them. These claims have been maintained and established as far west as the River Mississippi, by the sword. The title to a vast portion of the lands we now hold originates in them. It is not for the courts of this country to question the validity of this title, or to sustain one which is incompatible with it.

Although we do not mean to engage in the defence of those principles which Europeans have applied to Indian title, they may, we think, find some excuse, if not justification, in the character and habits of the people whose rights have been wrested from them.

The title by conquest is acquired and maintained by force. The conqueror prescribes its limits. Humanity, however, acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest. Most usually they are incorporated with the victorious nation, and become subjects or citizens of the government with which they are connected. The new and old members of the society mingle with each other; the distinction between them is gradually lost, and they make one people. Where this incorporation is practicable, humanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired; that the new subjects should be governed as equitably as the old, and that confidence in their security should gradually banish the painful sense of being separated from their ancient connections, and united by force to strangers.

When the conquest is complete, and the conquered inhabitants can be blended with the conquerors, or safely governed as a distinct people, public opinion, which not even the conqueror can disregard, imposes these restraints upon him; and he cannot neglect them without injury to his fame, and hazard to his power.

But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country was to leave the country a wilderness; to govern them as a distinct people was impossible, because they were as brave and as high-spirited as they were fierce, and were ready to repel by arms every attempt on their independence.

What was the inevitable consequence of this state of things? The Europeans were under the necessity either of abandoning the country, and relinquishing their pompous claims to it, or of enforcing those claims by the sword, and by the adoption of principles adapted to the condition of a people with whom it was impossible to mix, and who could not be governed as a distinct society, or of remaining in their neighborhood and exposing themselves and their families to the perpetual hazard of being massacred.

Frequent and bloody wars, in which the whites were not always the aggressors, unavoidably ensued. European policy, numbers, and skill prevailed. As the white population advanced that of the Indians necessarily receded. The country in the immediate neighborhood of agriculturists became unfit for them. The game fled into thicker and more unbroken forests, and the Indians followed. The soil, to which the crown originally claimed title, being no longer occupied by its ancient inhabitants, was parcelled out according to the will of the sovereign power, and taken possession of by persons who claimed immediately from the crown, or mediately, through its grantees or deputies.

That law which regulates, and ought to regulate in general, the relations between the conqueror and conquered, was incapable of application to a people under such circumstances. The resort to some new and different rule, better adapted to the actual state of things, was unavoidable. Every rule which can be suggested will be found to be attended with great difficulty.

However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.

So, too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to the others. However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two peoples, it may, perhaps, be supported by reason, and certainly cannot be rejected by courts of justice.

This question is not entirely new in this court. The case of Fletcher v. Peck grew out of a sale made by the State of Georgia of a large tract of country within the limits of that State, the grant of which was afterwards resumed. The action was brought by a sub-purchaser, on the contract of sale, and one of the covenants in the deed was that the State of Georgia was, at the time of sale, seized in fee of the premises. The real question presented by the issue was whether the seisin in fee was in the State of Georgia or in the United States. After stating that this controversy between the several States and the United States had been compromised, the court thought it necessary to notice the Indian title, which, although entitled to the respect of all courts until it should be legitimately extinguished, was declared not to be such as to be absolutely repugnant to a seisin in fee on the part of the State.

This opinion conforms precisely to the principle which has been supposed to be recognized by all European governments, from the first settlement of America. The absolute ultimate title has been considered as acquired by discovery, subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring. Such a right is no more incompatible with a seisin in fee than a lease for years, and might as effectually bar an ejectment.

Another view has been taken of this question, which deserves to be considered. The title of the crown, whatever it might be, could be acquired only by a conveyance from the crown. If an individual might extinguish the Indian title for his own benefit, or, in other words, might purchase it, still, he could acquire only that title. Admitting their power to change their laws or usages, so far as to allow an individual to separate a

portion of their lands from the common stock, and hold it in severalty, still, it is a part of their territory, and is held under them, by a title dependent on their laws. The grant derives its efficacy from their will; and, if they choose to resume it, and make a different disposition of the land, the courts of the United States cannot interpose for the protection of the title. The person who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under their protection, and subject to their laws. If they annul the grant, we know of no tribunal which can revise and set aside the proceedings. We know of no principle which can distinguish this case from a grant made to a native Indian, authorizing him to hold a particular tract of land in severalty.

As such a grant could not separate the Indian from his nation, nor give a title which our courts could distinguish from the title of his tribe, as it might still be conquered from, or ceded by, his tribe, we can perceive no legal principle which will authorize a court to say that different consequences are attached to this purchase because it was made by a stranger. By the treaties concluded between the United States and the Indian nations, whose title the plaintiffs claim, the country comprehending the lands in controversy has been ceded to the United States, without any reservation of their title. These nations had been at war with the United States, and had an unquestionable right to annul any grant they had made to American citizens. Their cession of the country, without a reservation of this land, affords a fair presumption that they considered it as of no validity. They ceded to the United States this very property, after having used it, in common with other lands, as their own, from the date of their deeds to the time of cession; and the attempt now made is to set up their title against that of the United States.

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It is supposed to be a principle of universal law that if an uninhabited country be discovered by a number of individuals, who acknowledge no connection with, and owe no allegiance to, any government whatever, the country becomes the property of the discoverers, so far, at least, as they can use it. They acquire a title in common. The title of the whole land is in the whole society. It is to be divided and parcelled out according to the

will of the society, expressed by the whole body, or by that organ which is authorized by the whole to express it.

If the discovery be made, and possession of the country be taken under the authority of an existing government, which is acknowledged by the emigrants, it is supposed to be equally well settled that the discovery is made for the whole nation, that the country becomes a part of the nation, and that the vacant soil is to be disposed of by that organ of the government which has the constitutional power to dispose of the national domains, by that organ in which all vacant territory is vested by law.

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It has never been contended that the Indian title amounted to nothing. Their right of possession has never been questioned. The claim of government extends to the complete ultimate title, charged with this right of possession, and to the exclusive power of acquiring that right. The object of the crown was to settle the sea coast of America; and when a portion of it was settled, without violating the rights of others, by persons professing their loyalty, and soliciting the royal sanction of an act, the consequences of which were ascertained to be beneficial, it would have been as unwise as ungracious to expel them from their habitations, because they had obtained the Indian title otherwise than through the agency of government. The very grant of a charter is an assertion of the title of the crown, and its words convey the same idea. The country granted is said to be "our island called Rhode Island"; and the charter contains an actual grant of soil as well as of the powers of government.

The letter was written a few months before the charter was issued, apparently at the request of the agents of the intended colony, for the sole purpose of preventing the trespasses of neighbors, who were disposed to claim some authority over them. The king being willing himself to ratify and confirm their title, was, of course, inclined to quiet them in their possession.

This charter and this letter certainly sanction a previous unauthorized purchase from Indians, under the circumstances attending that particular purchase, but are far from supporting the general proposition that a title acquired from the Indians would be valid against a title acquired from the crown, or without the confirmation of the crown.

The acts of the several colonial assemblies, prohibiting purchases from the Indians, have also been relied on as proving that, independent of such prohibitions, Indian deeds would be valid. But we think this fact, at most, equivocal. While the existence of such purchases would justify their prohibition, even by colonies which considered Indian deeds as previously invalid, the fact that such acts have been generally passed is strong evidence of the general opinion that such purchases are opposed by the soundest principles of wisdom and national policy.

After bestowing on this subject a degree of attention which was more required by the magnitude of the interest in litigation, and the able and elaborate arguments of the bar, than by its intrinsic difficulty, the court is decidedly of opinion that the plaintiffs do not exhibit a title which can be sustained in the courts of the United States; and that there is no error in the judgment against them in the district court of Illinois.

CHAPTER VII.

SEISIN AND LIVERY OF SEISIN.

Nature and Incidents of Seisin.

LEAKE, DIGEST OF LAND LAW.

46-48.

A feoffment might be made with an express appropriation of the seisin to a series of estates in the form of particular estate and remainders, and the livery to the immediate tenant was then effectual to transfer the seisin to or on behalf of all the tenants in remainder, according to the estates limited. But future estates could only be limited in the form of remainders, and any limitations operating to shift the seisin otherwise than as remainders expectant upon the determination of the preceding estate were void at common law. Thus, upon a feoffment, with livery of seisin, to A for life or in tail, and upon the determination of his estate to B, the future limitation takes effect as a remainder immediately expectant upon A's estate. But upon a feoffment to A in fee or for life, and after one year to B in fee;—or to A in fee, and upon his marriage to B in fee;—or to A in fee or for life, and upon B paying A a sum of money to B in fee,—the limitations shifting the seisin from A to B at the times and in the events specified, as they could not take effect as remainders, were wholly void at common law. Plowden, 29. Such limitations became possible in dealing with uses and in dispositions by will, as will appear hereafter.

The exigencies of tenure required that the seisin or immediate freehold should never be in abeyance, but that there should at all times be a tenant invested with the seisin ready, on the one hand, to meet the claims of the lord for the duties and services of the tenure, and, on the other hand, to meet adverse claims to the seisin, and to preserve it for the successors in the title. Co. Lit. 342 b; Butler's note, Ib; see 1 Hayes Conv. (5th ed.) 12, 14.

This rule had important effects upon the creation of freehold estates; for it followed as an immediate consequence of the rule, as also from the nature of the essential act of conveyance by livery of seisin, that a grant of the freehold could not be made or commence at a future time, leaving the tenancy vacant during the interval. "Livery of seisin must pass a present freehold to some person and cannot give a freehold in futuro."—"If a man makes a lease for life to begin at Michaelmas it is void, for he cannot make present livery to a future estate, and therefore in such case nothing passes." Co. Lit. 217 a; 5 Co. 94 b, Barwick's Case.

As a consequence of the same rule if a feoffment were made to A for life and after his death and one day after to B for life or in fee, the limitation to B was void, because it would leave the freehold without a tenant or in abeyance for a day after the death of A.

The seisin or freehold in remainder might be in abeyance during the continuance of the particular estate; for the present seisin of the tenant of that estate was sufficient to satisfy all the requirements of tenure, and it represented and supported all the future estates and interests in the fee.

Accordingly a remainder might be limited to take effect upon a condition, or in a person not ascertained, as an unborn child, so as to be in abeyance or uncertainty until the condition happened or the person became ascertained. Such a limitation was good and might remain in uncertainty so long as the particular estate continued, as it was supported by the seisin of that estate.

But it was essential that it should have become certain and absolute at the time when the particular estate determined; and, if not then ascertained, so as to be capable of taking up the seisin, it failed altogether, and the next estate in remainder took immediate effect.

A remainder limited to an uncertain person or upon an uncertain condition, and so long as the uncertainty lasted, became known as a contingent remainder. A remainder limited absolutely and to a determinate person, or which had become absolute and certain in ownership by subsequent events, was a vested remainder; the remainderman was presently invested with a portion of the seisin or freehold.

HARGRAVE'S NOTE.

217.

Seisin is a technical term denoting the completion of that investiture by which the tenant was admitted into the tenure, and without which no freehold could be constituted or pass. It is a word common as well to the French as to the English law. It is either in deed, which is, when the person has the actual seisin or possession; or in law, when, after a descent, the person, on whom the lands descend, has not actually entered, and the possession continues vacant, not being usurped by another. When lands of inheritance are carved into different estates, the tenant of the freehold in possession, and the persons in remainder or reversion, are equally in the seisin of the fee. But, in opposition to what may be termed the expectant nature of the seisin of those in remainder or reversion, the tenant in possession is said to have the actual seisin of the lands. The fee is intrusted to him. By any act which amounts to a disaffirmance by him of the title of those in the reversion, he forfeits his estate, and any act of a stranger which disturbs his estate is a disturbance of the whole fee.

Livery of Seisin.

LITTLETON, § 59.

48a-60.

And it is to be understood that in a lease for years, by deed or without deed, there needs no livery of seisin to be made to the lessee, but he may enter when he will by force of the same lease. But of feoffments made in the country, or gifts in tail, or lease for term of life; in such cases where a freehold shall pass, if it be by deed or without deed, it behooveth to have livery of seisin.

Coke, Littleton, 48 a, b. And there be two kinds of livery of seisin, viz., a livery in deed and a livery in law.

A livery in deed is when the feoffer taketh the ring of the door, or turf or twig of the land, and delivereth the same upon the land to the feoffee in name of seisin of the land, etc.

A livery in law is, when the feoffer saith to the feoffee, being in the view of the house or land, "I give you yonder land to you and your heirs, and go, enter into the same, and take possession thereof accordingly," and the feoffee doth accordingly in the life of the feoffer enter, this is a good feoffment. But if either feoffer or the feoffee die before entry the livery is void. And livery within the view is good where there is no deed of feoffment. And such a livery is good albeit the land lie in another county. A man may have an inheritance in an upper chamber, though the lower buildings and soil be in another, and seeing it is an inheritance corporeal it shall pass by livery.

§ 60. But if a man letteth lands or tenements by deed or without deed for term of years, the remainder over to another for life, or in tail, or in fee; in this case it behooveth that the lessor maketh livery of seisin to the lessee for years, otherwise nothing passeth to them in the remainder, although that the lessee enter into the tenements. And if the termor in this case entereth before any livery of seisin made to him, then is the freehold and also the reversion in the lessor. But if he maketh livery of seisin to the lessee, then is the freehold together with the fee to them in the remainder, according to the form of the grant and the will of the lessor.

CHAPTER X.

FEE SIMPLE.

LITTLETON, §§ 1, 2.

Tenant in fee simple is he which hath lands or tenements to hold to him and his heirs forever. And it is called in Latin feodum simplex, for feodum is the same that inheritance is, and simplex is as much as to say, lawful, or pure. And so feodum simplex signifies a lawful or pure inheritance. For if a man would purchase lands or tenements in fee-simple, it behooveth him to have these words in his purchase, To have and to hold to him and to his heirs: for these words (his heirs) make the estate of inheritage. For if a man purchase lands by these words, To have and to hold to him forever; or by these words, To have and to hold to him and his assigns forever: in these two cases he hath but an estate for term of life, for that there lack these words (his heirs), which words only make an estate of inheritance in all feoffments and grants.

And if a man purchase land in fee simple and die without issue, he which is his next cousin collateral of the whole blood, how far soever he be from him in degree, may inherit and have the land as heir to him.

"It is to be known that a freehold is that which one holds to himself and his heirs in fee and inheritance, or in fee only to himself and his heirs. So also it is freehold if one holds for life only or in the same way for an indeterminate time, without any certain limit of time; to wit, until something is done or not done, as if it is said, I give to such a one until I shall provide for him. But that cannot be called a freehold which one holds for a certain number of years, months, or days, although for a term of a hundred years which exceeds the lives of men. So that cannot be called a freehold which one holds at the will of his lords, which can be seasonably and unseasonably revoked, as from year to year, and from day to day." Bract. lib. 4, c. 28, fol. 207.

Effect of Omission of Word "Heirs"—Meaning of "Dying Without Issue"—Executory Devise.

SMITH v. KIMBALL.

153 Ill. 368. 1894.

MAGRUDER, J. This is a bill for the specific performance of a contract for the sale of real estate, filed by appellant against appellee. The bill was answered, and, after hearing had, the circuit court found the equities with the defendant, and dismissed the bill. The present appeal is prosecuted from such decree of dismissal. By the terms of the contract, appellee agreed to purchase lot 3, hereinafter mentioned, of appellant, for $9,000, payable, $100 in cash, and "the balance in twenty days after receiving an abstract showing good title" in appellant. The abstract of the title was furnished within the twenty days, and appellee refused to carry out the purchase, upon the ground that the abstract did not show a good fee-simple title in appellant. Appellant holds by deed from Frederick Mohlenpaugh, who received a conveyance from Sarah Jane Dustan. Sarah Jane Dustan, whose maiden name was Sarah Jane Spears, derived her title through the will of her mother, Abigail Spears. There is no question that Abigail Spears had good title, and that appellant owns whatever title was obtained by Sarah Jane Spears (afterwards Dustan) under said will. The question in dispute arises upon the construction of the will of Abigail Spears, which was executed on January 28, 1854, and, after providing for the payment of funeral expenses, is as folllows: "Second. My just debts are to be paid, and I appoint Alexander Tulloe, of Joliet, my executor. I also will and direct that forty acres of land lying in Will County, State of Illinois, shall be sold, and, after discharging the above expenses, the balance shall become and be the property of my daughter, Sarah Jane Spears. I also direct that lot No. 3, in block No. 21, in Joliet, Illinois, with its appurtenances, as deeded to me by David Richards and wife, and also all my interest in the lot of land now occupied by David Wooley, of La Porte County, State of Indiana, also my interest in the estate of my grandfather, Francis Lucas, all be and become the property of my daughter, Sarah

Jane Spears; and, should the said Sarah Jane Spears die leaving no heirs, I will and direct that all of the above-described property shall be equally divided between my sisters, to wit, Olinda Wooley, Deborah Wooley, Sarah Jane Wooley, Elizabeth Johnson; and it is my wish that my sisters, Deborah and Sarah, shall have the care and charge of my daughter, Sarah Jane Spears." Abigail Spears died on February 4, 1854, and left, her surviving, her daughter, the said Sarah Jane Spears, who afterwards married a man named Dustan, and has children living. The will was admitted to probate on February 11, 1854.

What title did Sarah Jane Spears take to the above-described lot 3 under the will of her mother? The testatrix directs that said lot 3, and all her interest in the lot occupied by David Wooley, also her interest in her grandfather's estate, "shall be and become the property of my daughter, Sarah Jane Spears." No words of inheritance, such as "and her heirs," are here used. This language would, at common law, only have given a life estate in the land. But § 13 of the conveyance act provided that "every estate in land which shall be granted, conveyed or devised, although the words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee simple estate of inheritance, if a less estate be not limited by express words, or do not appear to have been granted, conveyed or devised by construction or operation of law." Therefore, the clause directing that lot 3 "shall be and become the property of my daughter," standing alone, and without being qualified in any way by the language following it, vests in the daughter a fee transmissible to her heirs, notwithstanding the omission of the word "heirs." Baker v. Scott, 62 Ill. 86; Walker v. Pritchard, 121 Ill. 221, 12 N. E. 336; Wolfer v. Hemmer, 144 Ill. 554, 33 N. E. 751. Is a less estate limited by the words that follow, and, if so, what estate? Those words are "and, should the said Sarah Jane Spears die leaving no heirs, I will and direct that all of the above described property shall be equally divided between my sisters."

In view of the construction thus placed upon the first clause, as being a clause which, standing alone, vests a fee in the devisee, it is manifest that this is a case where the fee in the first instance is conveyed to the first taker; but an effort is made to transfer this fee, upon the happening of a specified contingency,

from the first taker to others, by way of executory devise. In other words, an attempt is made to mount a fee upon a fee, and this can only be done by executory devise. "An executory devise is a limitation by will of a future contingent interest in lands, contrary to the rules of limitation of contingent estates in conveyance at law." 4 Kent Comm., marg. p. 264. It is one of the rules governing contingent remainders that an estate cannot be limited over to another after a fee already granted. A remainder implies something left, and there can be nothing left after the whole has been once disposed of. It is for this reason that a fee already granted cannot be defeated and transferred to another by way of remainder. Hence the devise over, "should the said Sarah Jane Spears die leaving no heirs," can only be sustained, if at all, as an executory devise, and not as a contingent remainder. To prevent perpetuities in executory devises, it is an established rule that, in case of such a devise, the contingency upon which the intended limitation is to take effect shall not be postponed longer than a life or lives in being and twenty-one years and a fraction of another year thereafter. If the contingency is not fixed within that period, the executory devise is bad, and the limitation is void for remoteness; but, if it is so fixed, the devise is good, and the limitation is valid. In the present case the determination of the question whether the contingency upon which the limitation is to take effect is too remote, and by consequence, whether the limitation itself is void or not depends upon the construction to be given to the words "and should the said Sarah Jane Spears die leaving no heirs." The limitation to the sisters of the testatrix is dependent upon the event that the daughter should die "leaving no heirs." Do these words import a definite or indefinite failure of issue? A definite failure of issue is where a precise time is fixed by the will for the failure of issue; as in the case of a devise to A.; but, if he dies without issue living at the time of his death, then to another. An indefinite failure of issue means a failure of issue whenever it may happen, without fixing any time, or a certain and definite period within which it must happen. 4 Kent Comm., marg. p. 274; 1 Bouv. Law Dict., p. 642. An executory devise which is to take effect upon an indefinite failure of issue is void for remoteness. 4 Kent Comm., marg. p. 274. The words "dying without issue," or "die without issue," when standing

alone, are held by the great weight of authority in England and in this country to denote an indefinite failure of issue, and a limitation upon such terms, unqualified, is regarded as void for remoteness. 2 Washb. Real Prop., marg. pp. 360, 361. But the courts often avail themselves of slight circumstances to give to executory devisees a construction which regards the failure of issue as relating to a definite period of time, and not an indefinite failure. Id., marg. p. 362. "Slight circumstances are laid hold of as sufficient to indicate an intention that a limitation over on death without issue shall take effect at a definite time, to wit, on the death of the first taker." 2 Redf. Wills (3d ed.), marg. p. 277, and note 51; Bedford's Appeal, 40 Pa. St. 18. The words "die without leaving issue surviving," or "leaving no issue or child," or "if he should leave no children," have been held to create a definite failure of issue. * * *

In the case at bar the words are "die leaving no heirs." The word "heirs" may sometimes be construed to mean "children" or "issue," according to the context. Loveday v. Hopkins, 1 Amb. 273; Smith v. Harris, supra; Goodell v. Hibbard, supra; Griswold v. Hicks, 132 Ill. 494, 24 N. E. 63; Summers v. Smith, 127 Ill. 645, 21 N. E. 191. In the will now under consideration the word evidently means "children," because if the intention was to include heirs generally, the sisters of the testator, who were to take upon the happening of the contingency, being the aunts of the daughter, might be included among her heirs. It could hardly have been the intention of the testator that her sisters should take in the event of her daughter dying without leaving these same sisters as her heirs. But, while the word "heirs" is here evidently intended to mean "children," it unquestionably refers to children as the heirs of the devisee. The word "heirs" is ordinarily used in wills to designate those persons who answer this description at the death of the testator. The word "heir," in its strict and technical import, applies to the person or persons appointed to succeed to the estate in case of intestacy. Kellett v. Shepard, 139 Ill. 433, 28 N. E. 751, and 34 N. E. 254. Those who succeed to the estate are those who are understood to be living at the time of the intestate's death. If this view be correct, the words "should the said Sarah Jane Spears die leaving no heirs" mean "should the said Sarah Jane Spears die leaving no children at the time of her death." This

construction receives support from the fact that the persons who are to take in the event of the death of the daughter leaving no heirs were in existence at the time of the making of the will, and are mentioned by name. Mention of the sisters as being then alive, and the designation of two of them to take the care and the charge of the daughter, are facts which do not consist with the idea that those sisters were to take the estate if, at any time in the future, no matter how remote, the heirs of Sarah Jane Spears should become extinct. * * *

In the recent case of Summers v. Smith, 127 Ill. 645, 21 N. E. 191, the language of the will was: "It is further my will, in case any of my sons," etc., "should die without heirs of his body, the real estate I have bequeathed to him shall go to his surviving brother or brothers." It was held that, where the devise over is to the survivor or survivors of a class to which the first devisee belonged, it means a devise to a person in being at the death of the first devisee, and so relieves the devise over of objection on account of remoteness; and it was there said: "In the absence of anything appearing to the contrary, language must be presumed to have been intended to have the legal effect which the law assigns to it. So, therefore, here, 'dying without heirs of body' could only mean dying without leaving such heirs of body as the estate would have vested in, in fee, instantly, upon the death of the first devisee, as children," etc. The rule, as announced by the English cases, is that a devise in fee, with a remainder over if the devisee dies without issue or heirs of the body, is a fee cut down to an estate tail; and the limitation over is void, by way of executory devise, as being too remote and founded on an indefinite failure of issue. 4 Kent Comm., marg. p. 276. But § 6 of the Illinois conveyance act provides that "in cases where, by the common law, any person or persons might hereafter become seized, in fee tail, of any lands, tenements or hereditaments, by virtue of any devise, gift, grant, or other conveyance, hereafter to be made, or by any other means whatsoever, such person or persons, instead of being or becoming seized thereof in fee tail, shall be deemed and adjudged to be and become seized thereof for his or her natural life only, and the remainder shall pass in fee simple absolute to the person or persons to whom the estate tail would, on the death of the first grantee, devisee or donee in tail first pass, according to the

course of the common law, by virtue of such devise, gift, grant or conveyance." 1 Starr & C. Ann. St., p. 571. Hence the same reasons for holding that the words "die leaving no heirs" refer to issue indefinitely or a failure of issue at any time, rather than to a failure of issue at the death, do not exist in this State, where we have no estates tail, as exist where, as at common law, estates tail are recognized. Summers v. Smith, supra. In Voris v. Sloan, 68 Ill. 588, the words "in case she should die without issue," occurring in a deed of trust, were construed to mean "without having had issue"; so that, upon the birth of a child or children of the body, the contingency was fulfilled, and the fee vested in them, and the limitation over was defeated. But the plain and obvious meaning of the expression "should the said Sarah Jane Spears die leaving no heirs" or children is that she should die leaving no heirs or children at the time of her death. This construction accords with the grammatical relation of the words in the phrase, and with the common understanding of their import. Williams v. Lewis, 100 N. C., 142, 5 S. E. 435; Hall v. Chaffee, 14 N. H. 215.

The necessary result of this construction by which the words in question are held to import a definite, and not an indefinite, failure in issue, is that the devise to Sarah Jane Spears must be regarded as the devise of a fee determinable upon her dying without leaving children at the time of her death. Summers v. Smith, supra. It cannot be known until the death of Mrs. Dustan whether the contingency will happen by which the limitation over is to take effect. If she dies leaving no children at the time of her death, her mother's sisters will take the property; but, if she leaves a child or children at that time, such child or children will take the property as her heirs. It follows that appellant did not have such a fee-simple title as was called for by the contract, and the decree of the court below was right.

It is most strenuously contended by counsel for appellant that the words "die leaving no heirs" refer to the death of the devisee in the lifetime of the testatrix, and that, as she survived the testatrix, the fee simple vested in her. Several cases in New York and Pennsylvania are referred to which seem to sustain this view. But they are not applicable here, for the reasons involved in the observations already made. "When the death of the first taker is coupled with other circumstances, which may

or may not ever take place—as, for instance, death under age or without children—the devise over, unless controlled by other provisions of the will, takes effect, according to the ordinary and literal meaning of the words, "upon death" under the circumstances indicated, at any time, whether before or after the death of the testator. Britton v. Thornton, 112 U. S. 526, 5 Sup. Ct. 591; Buchanan v. Buchanan, 90 N. C. 308, 5 S. E. 430; Summers v. Smith, supra; 11 Am. & Eng. Enc. Law, p. 919. The language of the provisions in the will sustains the view that the death of the devisee in the lifetime of the testatrix was not intended. The testatrix wills and directs that forty acres of land be sold, "and after discharging the above expenses," the balance shall become and be the property of my daughter. The "above expenses" included funeral expenses, which, of course, could not be incurred until after the death of the testatrix. The last clause directs that "all of the above-described property shall be equally divided between my sisters," should the daughter die leaving no heirs. "All of the above-described property" includes the balance of the proceeds of the sale of the forty acres after paying funeral and other expenses, which balance could not exist until after the death of the testatrix; and, as the distribution to the sisters could not take place until after the death of the daughter, the death of the daughter must have been contemplated as occurring after that of the testatrix. We think, however, that the court below should have dismissed the bill without prejudice, so as to leave appellant to his remedy at law. The decree of the circuit court will accordingly be reversed, and the cause is remanded to that court, with directions to dismiss the bill without prejudice.

Reversed and remanded, with directions.

CHAPTER XI.

DETERMINABLE OR BASE FEE.

Definition.

AHLFIELD ET AL. v. CURTIS ET AL.

229 Ill. 139, 82 N. E. 276. 1907.

Error to Circuit Court, Edwards County; J. R. Creighton, Judge.

Bill by Frank Curtis and another against Samuel Ahlfield and others, for the sale of certain lands and the distribution of the proceeds. From a decree in favor of complainants, defendants bring error. Affirmed.

VICKERS, J. The only question involved in this case that requires discussion relates to the construction to be given to the second clause of the testatrix's will. That clause, omitting formal and descriptive parts, reads as follows: "I give, devise and bequeath to my daughter, Anna M. Ryan, all my real estate, then to her heirs. * * * If my daughter should die leaving no heirs of her own, then I wish the real estate to be sold and the money divided in two equal parts, and one part to go to Minnie E. Ryan and Mary E. Ryan, daughters of my former husband, and the other half to go to my brothers, Frank and John Curtis. Both sets of heirs shall have the right to buy the others out." The word "heirs" in the sentence, "I give, devise and bequeath to my daughter, Anna M. Ryan, all my real estate, then to her heirs," is used in its legal, technical sense, and means all those persons who would succeed to the estate in case of intestacy. The effect of this clause is to vest a fee-simple title in the devisee, Anna M. Ryan. By the subsequent clause, "if my daughter should die leaving no heirs of her own," etc., the fee previously devised is made to depend on a condition which may or may not happen. If she dies leaving a child or children, which is the evident meaning of the words "heirs of

her own," the fee devised to her passes to such child or children. If, however, she dies leaving no child or children, then the devise over of the remainder takes effect and the fee to the first devisee comes to an end and is determined. The estate of Anna M. Ryan was, therefore, a base or determinable fee. Such an estate is distinguishable from a life estate, in that it might last forever in case the first taker dies leaving a child or children, but it is liable to be terminated by her death without leaving such child or children. Anna M. Ryan having died without leaving a child or children, the devise over took effect, and appellants, who claim as her collateral heirs, have no interest in the estate in question.

Plaintiffs in error do not seriously contend that the word "heirs" in the second clause of this will should receive its technical meaning, but, conceding, as they seem to do, that such is the proper construction of that word as employed by the testatrix in the second clause of her will above set out, it is insisted that the clause, "if my daughter should die leaving no heirs of her own, then I wish the real estate to be sold," etc., refers to the death of the primary devisee prior to the death of the testatrix; hence the gift over was substitutionary and dependent upon the death of the primary devisee in the lifetime of the testatrix and was designed to prevent a lapse, and that, since Anna M. Ryan survived the testatrix, her estate became a fee simple and descended to her heirs. This court has had occasion to construe similar clauses in wills often, and the rule may be regarded as well established that when the death of the first taker is coupled with circumstances which may or may not take place, as, for instance, death under age or without children, the devise over, unless controlled by other provisions of the will, takes effect, according to the ordinary and general meaning of the words, upon the death, under the circumstances indicated, at any time, whether before or after the death of the testator. Summers v. Smith, 127 Ill. 645, 21 N. E. 191; Smith v. Kimball, 153 Ill. 368, 38 N. E. 1029; Bradsby v. Wallace, 202 Ill. 239, 66 N. E. 1088; Fifer v. Allen, 81 N. E. 1105. In the case at bar it is clear that the testatrix contemplated that her daughter would survive her. She is made executrix of the will, and certain duties are enjoined upon her in respect to furnishing the mother of the testatrix with a home, etc., clearly indicating that the death of the devisee meant a death after the death of the

testatrix. Anna M. Ryan died after the death of the testatrix, leaving no children. Her estate in the lands devised thereby terminated and the devise over took effect. There was, therefore, no error in overruling the demurrer of Ahlfield and Walter to the bill of defendants in error.

The decree of the circuit court of Edwards County should be, and is accordingly, affirmed.

Decree affirmed.

Determinable and Base Fees.

CHRISTOPHER CORBET'S CASE.

2 And. 134, 138, 139 (Eng.). 1588.

ANDERSON, C. J. Intendments should be guided by the rules of the law, and not by idle conceits, and to prove this further, 13 Hen. VII., 11 Hen. VII., 21 Hen. VI. fo. 37, it is held, and the law seems plain, that if land be given to one and his heirs so long as J. S. has heirs of his body, the donee has a fee and may alien it notwithstanding there be a condition that he shall not alien; and 11 lib. Assize, p. 8, a like case is put and held as above: and there if land be given to one and his heirs so long as J. S. or his heirs may enjoy the Manor of D., those words (so long) are utterly vain and idle, and do not abridge the estate * * * and yet it is to be admitted that one may have an estate in fee determinable, but never by the act and consent of the parties without any entry for condition broken or title defeasible; and to show briefly how this will be is now convenient, and it will be if the lord of a villein being tenant in tail enters on the land, etc., he and his heirs will enjoy the land so long as the villein has issue, and then his estate determines; so he who recovers rent against a tenant in tail, "que ill teign in tail" [out of what he holds in tail?]; or [suppose] that tenant in tail of land be attainted of treason, the king will have a fee of the land entailed determinable on death without issue, and has no greater estate; but these estates last mentioned are not made by the first creation of the estates but by matter coming afterwards by other means.

Before the statute of Quia Emptores (18 Edw. 1) an estate

might have been granted to A. B. and his heirs, so long as C. D. and his issue should live, or so long as C. D. and his heirs should be tenants of the manor of Dale; and upon C. D.'s ceasing to have issue, or to be tenant of the manor of Dale, the estate reverted to the donor, not as a condition broken, of which the donor, or his heir, might take advantage by entry, but as a principle of tenure, in the nature of an escheat upon the death of a tenant in fee simple without heirs general. But the statute of Quia Emptores destroys the immediate tenure between the donor and donee, in cases where the fee is granted; and consequently there can now be no reverter, or any estate or possibility of a reversion remaining in the donor after an estate in fee granted by him. This conclusion directly follows from the doctrine of tenures, and the effect of the statute of Quia Emptores upon that doctrine. The proposition does not require the aid of decided cases; but the passage in 2 And. 138 contains an accurate exposition of the law upon this subject: "If land be given to A. and his heirs, so long as J. S. has heirs of his body, the donee has fee, and may alien it. 13 Hen. 7; 11 Hen. 7; 21 Hen. 6, fol. 37; and says the law seems to be plain in it; and cites 11 Ass. 8, where the s. c. is put and held as before; and that there if the land be given to one and his heirs, so long as J. S. and his heirs shall enjoy the manor of D., those words (so long) are entirely void and idle, and do not abridge the estate."

The references in this passage (with the exception of the 11 Ass. 8) are not in the report correctly stated; but they are discovered in 13 Hen. 7, Easter Term, fol. 24; 11 Hen. 7, pl. 25; 21 Hen. 6, Hill, pl. 21. It will be proper to refer to the case first mentioned; premising, that, by the common law, where an absolute estate in fee simple was granted, no restraint could be placed on the alienation of it; inasmuch as such restraint would be repugnant to the grant itself. Upon a question in the case referred to, whether a condition restraining alienation upon the grant of an estate-tail since the statute De Donis was valid, Vavisour thought it valid; but added, that he agreed that such condition imposed on a feoffee in fee simple, so long as J. S. has issue, was void. 1 Sand. Uses (5th ed.) 208-210. See Gray, Perpetuities, §§ 31-41.

CHAPTER XII.

ESTATES TAIL.

LITTLETON.

§§ 13-19, 21-24.

Tenant in fee tail is by force of the statute of W[estm]. II. c. 1, for before the said statute all inheritances were fee simple; for all the gifts which be specified in that statute were fee simple conditional at the common law, as appeareth by the rehearsal of the same statute. And now by this statute tenant in tail is in two manners,—that is to say, tenant in tail general, and tenant in tail special.

(Tenant in tail general is, where lands or tenements are given to a man and to his heirs of his body begotten.) In this case it is said general tail, because whatsoever woman that such tenant taketh to wife (if he hath many wives, and by every of them hath issue), yet every one of these issues by possibility may inherit the tenements by force of the gift; because that every such issue is of his body engendered.

In the same manner it is where lands or tenements are given to a woman and to the heirs of her body; albeit that she hath divers husbands, yet the issue which she may have by every husband may inherit as issue in tail by force of this gift; and therefore such gifts are called general tails.

(Tenant in tail special is, where lands or tenements are given to a man and to his wife and to the heirs of their two bodies begotten.) In this case none shall inherit by force of this gift but those that be engendered between them two. And it is called especial tail, because if the wife die, and he taketh another wife and have issue, the issue of the second wife shall not inherit by force of this gift, nor also the issue of the second husband, if the first husband die.

In the same manner it is where tenements are given by one man to another with a wife (which is the daughter or cousin to

the giver) in frankmarriage, the which gift hath an inheritance by these words (frankmarriage) annexed unto it, although it be not expressly said or rehearsed in the gift,—that is to say, that the donees shall have the tenements to them and to their heirs between them two begotten. And this is called especial tail, because the issue of the second wife may not inherit.

And note, that this word (Talliere) is the same as to set to some certainty or to limit to some certain inheritance. And for that it is limited and put in certain what issue shall inherit by force of such gifts, and how long the inheritance shall endure, it is called in Latin feodum talliatum. For if tenant in general tail dieth without issue, the donor or his heirs may enter as in their reversion.

In the same manner it is of the tenant in especial tail, etc. For in every gift in tail without more saying the reversion of the fee simple is in the donor. And the donees and their issue shall do to the donor and to his heirs the like services as the donor doth to his lord next paramount, except the donees in frankmarriage, who shall hold quietly from all manner of service (unless it be for fealty) until the fourth degree is past, and after the fourth degree is past, the issue in the fifth degree, and so forth the other issues after him, shall hold of the donor or of his heirs as they hold over, as before is said.

And all these entails aforesaid be specified in the said statute of W[estm]. II. Also there be divers other estates in tail, though they be not by express words specified in the said statute, but they are taken by the equity of the same statute. As if lands be given to a man and to his heirs males of his body begotten; in this case his issue male shall inherit, and the issue female shall never inherit, and yet in the other entails aforesaid it is otherwise.

In the same manner it is if lands or tenements be given to a man and to his heirs female of his body begotten; in this case his issue female shall inherit by force and form of the said gift, and not his issue male. For in such cases of gifts in tail the will of the donor ought to be observed who ought to inherit and who not.

And in case where lands or tenements be given to a man and to the heirs males of his body, and he hath issue two sons, and dieth, and the eldest son enter as heir male, and hath issue a

daughter, and dieth, his brother shall have the land, and not the daughter, for that the brother is heir male. But otherwise it is in the other entails which are specified in the said statute.

The Rule in Shelley's Case.

LEHNDORF v. COPE.

122 Ill. 317, 112 N. E. 505. 1888.

SHOPE, J. It is contended by appellee that by the deed of August 3, 1883, from Humphrey and wife to "Maria Anna Lehndorf, and her heirs by her present husband, Henry Lehndorf," Mrs. Lehndorf took a fee-simple estate in the lands conveyed; while appellants contend that she thereby took a life-estate only, with remainder in fee to her children by said Henry Lehndorf. The deed, being statutory in form, contains no habendum limiting or defining the estate taken by Mrs. Lehndorf; and although the deed must be held equivalent to one containing full covenants (Elder v. Derby, 98 Ill. 228), it is manifest that the estate granted would not be enlarged or restricted thereby. Such covenants are an assurance of the title granted to the grantees, whomsoever they may be. If Mrs. Lehndorf took the fee, the covenants assure that estate to her; if she takes an estate in tail, the covenantor warrants to her a life-estate, and the remainder in fee to whoever would take upon determination of her estate. Therefore, as said by counsel for appellees, the determination of the question depends upon a construction of the granting clause of the deed, which is that the grantors, in consideration, etc., "convey and warrant to Maria Anna Lehndorf, and her heirs by her present husband, Henry Lehndorf, of," etc., the lands in controversy.

The legitimate purpose of all construction of a contract or other instrument in writing is to ascertain the intention of the party or parties in making the same; and, when this is determined, effect will be given thereto, unless to do so would violate some established rule of property. The nature and quantity of the interest granted by a deed are always to be ascertained from the instrument itself, and are to be determined by the court as a matter of law. The intention of the parties will control the court in construction of the deed; but it is the intention appar-

ent and manifest in the instrument, construing each clause, word, and term involved in the construction according to its legal import, and giving to each, thus construed, its legal effect. 3 Washb. Real Prop. 404; Bond v. Fay, 12 Allen, 88; Lippett v. Kelley, 46 Vt. 516; Price v. Sisson, 13 N. J. Eq. 169, 178; Caldwell v. Fulton, 31 Pa. St. 489; Wager v. Wager, 1 Serg. & R. 374. It cannot be presumed that the parties used words or terms in the conveyance without intending some meaning should be given them, or without an intent that the effect legitimately resulting from their use should follow; hence, if it can be done consistently with the rules of law, that construction will be adopted which will give effect to the instrument, and to each word and term employed, rejecting none as meaningless or repugnant.

We should, perhaps, first notice the contention of counsel for appellee that, by virtue of § 13 of the conveyance act (as there is here no express limitation upon the estate of Mrs. Lehndorf, and as no one can have heirs while living), the words following the grant to her should be rejected, and the deed read as if to her only. This arises from a misapprehension of the statute. The evident purpose of the section referred to was to change the rule of the common law, whereby, if a conveyance, etc., was made without words of inheritance, an estate for the life of the grantee only was created. The section is as follows: "§ 13. Every estate in lands which shall be granted, conveyed, or devised, although other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee-simple estate of inheritance, if a less estate be not limited by express words, or do not appear to have been granted, conveyed, or devised by construction or operation of law." It is not necessary, as seems to be supposed, that, to create a less estate than the fee, there should be express words of limitation, either under the statute or at common law. It is sufficient for that purpose if it appear by necessary implication that a less estate was granted. In an early case, Frogmorton v. Wharrey, 2 W. Bl. 728, where there was a surrender of copyholds by R., who was seised in fee to M., his then intended wife, and the heirs of their two bodies, etc., Wilmot, C. J., delivering the opinion of the court for himself, Bathurst, Gould, and Blackstone, JJ., after holding on authority of Gossage v. Tayler, Style, 325, and Lane v.

Pannell, 1 Rolle, 438, that the children thus begotten took as purchasers, and not as heirs, says the only difference in the cases is that in those cases "the wife had an express estate for life, and here not. But upon legal principle the cases are just alike. An estate 'to A. and the heirs of his body,' is the same as an estate 'to A. for life, remainder to the heirs of his body.'" By operation of law, the added words created, in the case cited in M. a life-estate only, with remainder to the heirs of herself and R., as purchasers. So the grant "to A. and the heirs of his body," by operation of law, creates an estate-tail in A., remainder in tail. And this has been the uniform holding.

The sixth section of the conveyance act provides that in cases where, by the common law, any person or persons might, after its passage, become seised in fee-tail of any lands, etc., by virtue of any gift, devise, grant, or conveyance "hereafter to be made," or by any other means whatsoever, such person or persons, instead of being or becoming seised thereof in fee-tail, shall be deemed and adjudged to be and become seised thereof for his natural life only, and the remainder shall pass, in fee-simple absolute, to the person or persons to whom the estate-tail would on the death of the first grantee or donee, pass according to the course of the common law, by virtue of such gift, devise, or conveyance. It is apparent if, at common law, by virtue of this conveyance, Mrs. Lehndorf would take an estate-tail, whether an estate-tail general or an estate-tail special, the thirteenth section would be inoperative, and by virtue of § 6 she would become seised of an estate for her life, with remainder in fee to those to whom the estate is immediately limited.

Estates-tail came into general use upon construction by the courts of the statute de donis conditionalibus (13 Edw. I. c. 1); and, while no extended discussion will be necessary, an examination sufficient tc determine if this case falls within the rules creating an estate-tail will be proper. To create an estate in fee-simple at common law, the grant must be to the grantee and his heirs, without limitation, to take from generation to generation in the regular course of descent. A tenant in fee-simple is defined by Blackstone to be "he that hath lands, tenements, or hereditaments, to hold to him and his heirs forever, generally, absolutely, simply; without mentioning what heirs, but referring that to his own pleasure, or the disposition of the law."

2 Bl. Comm. 104. Estates in fee-tail were of two kinds: Estates-tail general, as where the grant was to one, and the heirs of his body generally, so that his issue in general, by each and all marriages, are capable of taking per forman doni; and estates-tail special, where the gift or grant was restricted to certain heirs, or class of heirs, of the donee's body. 2 Bl. Comm. 113, 114; 4 Kent Comm. 11; 1 Washb. Real Prop. *66. In a grant of lands, words of inheritance were necessary at common law to the creation of a fee; but in the creation of a fee-tail estate more was required. There must also be words of procreation, indicating the body out of which the heirs were to issue, or by whom they were to be begotten. The ordinary formula was to make the gift or grant to the donee, as the grantee was called, "and the heirs of his body," or "her heirs upon her body to be begotten," or "upon her body to be begotten by A." But there was no special efficiency in these particular forms of words, and it was requisite only that, in addition to limitation to "heirs," the description of the heirs should be such that it should appear they were to be the issue of a particular person. 2 Bl. Comm. 114; 1 Washb. Real Prop. *72; 2 Prest. Est. 478, and cases cited; 2 Jarm. Wills, 325.

The necessary words of inheritance are not here wanting to create a fee-simple or a fee-tail at common law. The grant is to Mrs. Lehndorf and her heirs, and, if the description had stopped here, a fee-simple estate would at common law have passed by the deed. The grant is not, however, to her and her heirs simpliciter, but to her and her heirs by a particular husband, and by necessary implication excludes the construction that heirs generally were intended. Heirs generally would include, not only those designated, but children she may have, or have had by any other husband, as well as collaterals. Who, under the law, could be her heirs by her present husband except her children by him begotten? If the word "begotten" had been introduced before the preposition "by," so that it would have read "her heirs begotten by her present husband," etc., it would have been no more certain that the issue of her body was intended. If it be conceded that the equivalent words, which by necessary implication describe and designate the particular body out of which the heirs should proceed, would suffice to create an estate-tail at common law, which seems to be done by the cases and

text-writers, then the conclusion seems irresistible that such an estate was here created. "Her heirs by her present husband" could be no other than the issue of her body by him begotten; no other person or class of persons would answer the description, and they would and do fill it in every particular.

This precise point was ruled in Wright v. Vernon, 1 Drew. 439, where it is said: "The effect, therefore, of a limitation 'to the right heirs of Sir Thomas Sanwell by a particular wife forever,' is precisely the same as that of a limitation to the heirs of his body by that particular wife forever. The words 'of his body' are not in the least degree necessary to this construction of the terms 'heirs' or 'right heirs,' because, without their insertion, the full and absolute effect of them is involved in the description, 'his right heirs by Mary, his second wife;' which description limits the meaning of the term 'heirs' to heirs special, procreated by himself, as effectually and as necessarily as the words 'of his body,' could do if they had been added." This was a case, it is true, arising upon a devise, in respect of which much greater latitude of construction is allowable than in the construction of deeds; but that consideration can in no way affect the weight of the authority upon the matter being considered.

It follows that Mrs. Lehndorf would, at common law, be seised, by virtue of this conveyance, of an estate-tail special in the lands conveyed, and therefore, under the statute, would take an estate for her life only; and that, by virtue of the statute cited, the remainder vested in fee in her children by her said husband in esse at the time of making the deed—subject, possibly, however, to be opened to let in after-born children of the same class. If no issue of her body "by her present husband" had been then living, the remainder would have fallen under Fearne's fourth and Blackstone's first definition of a contingent remainder; *i. e.*, when the remainder is limited "to a dubious and uncertain person." But here, at least two of the children who would, under the statute, take the fee-simple estate upon the termination of the life-estate, were in being when the deed was executed and delivered, and the remainder vested immediately in them in fee, subject to the possible contingency of being divested pro tanto, if opened to let in after-born children answering the same description. The person to whom the remainder

is limited is ascertained; the event upon which it is to take effect is certain to happen; and, although it may be defeated by the death of such person before the determination of the particular estate, it is vested remainder. "It is the uncertainty of the right of enjoyment which renders a remainder contingent; not the uncertainty of its actual enjoyment." 2 Bl. Comm. 169; Fearne Rem. 149; 4 Kent Comm. 203; Hawley v. James, 5 Paige, 467; Williamson v. Field, 2 Sandf. Ch. 533; Moore v. Lyons, 25 Wend. 144.

But it is said that the rule in Shelley's Case should be applied; but it will be seen that its application will produce the same result. That rule, as formulated by Jarman in his work on Wills, p. 331, will best illustrate the position here. It is: "The rule simply is: that where an estate of freehold is limited to a person and the same instrument contains a limitation, either mediate or immediate, to his heirs, or the heirs of his body, the word 'heirs' is a word of limitation, *i. e.*, the ancestor takes the whole estate comprised in this term. Thus, if the limitation be to the heirs of his body, he takes a fee-tail; if to his heirs general, a fee-simple." The rule operates upon the words of inheritance without affecting the words of procreation; so that if in any case the words "heirs of his body" or other equivalent sufficient to create an estate-tail, are used, a fee-tail is vested in the first taker, and not the fee-simple, as seems to be supposed. Therefore, if the rule be applied, Mrs. Lehndorf would at common law be seised of an estate in fee-tail, and brought directly within the terms of section 6 of the conveyance act before cited. When, therefore, Mrs. Lehndorf, joined by her husband, mortgaged the land to Humphrey, it was not in her power to incumber the fee; and that estate passed to and vested in her two children then living, unincumbered by the lien created by the mortgage.

The decree of the circuit court will be reversed, and the cause remanded for further proceedings not inconsistent with this opinion. Reversed and remanded.

CHAPTER XIII.

RULE IN SHELLEY'S CASE.

LEHNDORF v. COPE.

(See page 631.)

Rule in Shelley's Case Applied to Trusts—Statute of Uses Applied to Trusts.

STEELE ET AL. v. SMITH ET AL.

84 S. C. 464, 66 S. E. 200. 1909.

Action by Susan A. Steele and others against Alice Smith and others. Judgment for defendants. Plaintiffs appeal. Affirmed.

JONES, C. J. This appeal involves the construction of the deed executed November 16, 1860, in the presence of three witnesses by John Steele, Sr., to Joseph A. Steele, as trustee, conveying a tract of 494 acres in York county. The deed recites that it is in consideration of love and affection for his sons and grandson named, and conveys to Joseph A. Steele, his heirs and assigns forever, with covenants of warranty, the land in question: "In trust as to the one-half of said piece, parcel or tract of land, to stand seized and possessed of the same, for the use and benefit of my grandson, the above-mentioned John G. Steele, for and during the term of his natural life; and at his death to transfer and convey the same to such person or persons, as he, the said John G. Steele, may by his will direct, or in fault of such will and direction, to the heirs of him and the said John G. Steele, in fee: Provided, however, and the estate above mentioned is hereby given and conveyed, upon the expressed condition and understanding, that I am to have and continue in the use and enjoyment of said premises during my natural life; and upon the further condition that the said Joseph A. Steele and John G. Steele, each contributing equally, pay or cause to

be paid to my son, James B. Steele, above mentioned, within a reasonable time after my death, the sum of $1,666.66⅔, with interest thereon from the date of my death." It appears that the grantor, John Steele, Sr., died soon after the execution of the deed, and the grantee, Joseph A. Steele, trustee, died within a few years thereafter. John G. Steele, the grandson of the grantor, married the plaintiff, Susan A. Steele, January 4, 1866, and their first born child, plaintiff John Atkinson Steele, was born December 17, 1866, and the remaining plaintiffs are children of John G. and Susan A. Steele subsequently born. On August 3, 1868, John G. Steele conveyed to R. Paterson & Co. lands embracing the land in controversy, and defendants are in possession claiming title by successive conveyances under John G. Steele. John G. Steele died intestate in 1905.

Plaintiffs claim that John G. Steele had only a life estate, and, having died without executing the power of appointment by will, they are entitled to partition of the land (now in the exclusive possession of defendants) as heirs of John G. Steele and remaindermen under the deed of John Steele, Sr. The circuit court sustained this contention. The defendants—appellants contend that under the rule in Shelley's Case John G. Steele had a fee-simple estate in the land which they acquired. The instrument is not a covenant to stand seised to uses, as contended by respondent, as the fee in præsenti is conveyed to grantee charged with the usufruct for life in favor of the grantor. Cribb v. Robers, 12 S. C. 564, 32 Am. Rep. 511; Ellen v. Ellen, 16 S. C. 142. It is in form and substance an ordinary deed conveying real estate in trust, and must be construed as such. Preston's statement of the rule in Shelley's Case as quoted in Porter v. Doby, 2 Rich. Eq. 52, is: "When a person takes an estate of freehold legally or equitably under a deed, will, or other writing, and in the same instrument there is a limitation by way of remainder either with or without the interposition of another estate of an interest of the same legal or equitable quality to his heirs or heirs of his body, or a class of persons to take in succession from generation to generation, the limitation to the heirs entitled the ancestor to the whole estate." The case of Porter v. Doby, supra, shows that executory trusts are exempt from the operation of the rule in Shelley's Case, and that the tests of an executory trust is whether the trustee has some duty

to perform for the performance of which it is necessary that the title be regarded as abiding in him. It is unnecessary to refer to the cases on the subject. A number of them are mentioned in Reynolds v. Reynolds, 61 S. C. 250, 39 S. E. 391.

Appellants concede that the rule does not apply to trusts which are strictly executory, as where the trust is imperfectly or defectively declared, or where some discretion is left with the trustee, but does apply where the trust is perfect and finally declared, and no room is left for the exercise of discretion by the trustee. The argument to this point is keen and forceful, and there is some high authority for the view. But we think it is clear that the trust in this case is such an executory trust as will prevent the application of the rule in Shelley's Case. In order to convey the fee to the appointee of the life tenant, it was essential to the performance of this duty that the trustee retain the title in fee until it was ascertained that there was default of such appointment at the termination of the life estate. The trust was not a perfect trust, as it involved for its full execution the exercise or failure to exercise a discretionary power of appointment by the life tenant. True, the discretion was not directly left to the trustee, but it was left to another by which the trustee was to be guided in the event of its exercise. The discretionary power of the life tenant to designate a beneficiary of the trust by will necessarily affected the certainty and completeness of the trust, with respect to its beneficiaries. Hence the case clearly falls within the definition of an executory trust in Perry on Trusts, § 359, relied upon by appellant as stating the correct principle: "But in order that technical words may receive their legal signification, and in order that the rule in Shelley's Case may be applied to limitations to equitable estates, the trusts must be executed, and not executory. All trusts are executory in one sense of the word; that is, the trustee must have some duty, either active or passive, to perform, so that the statute of uses shall not execute the estate in the cestui que trust, and leave nothing in the trustee. But such is not the meaning of the judges when they speak of executed trusts and executory trusts. These words refer rather to the manner and perfection of their creation than to the action of the trustee in administering the property. Thus a trust created by a deed or will so clear and certain in all its terms and limitations that a trustee

has nothing to do but to carry out all the provisions of the instrument according to its letter is called an executed trust. In these trusts technical words receive their legal meaning, and the rule applicable to legal estates governs the equitable estates thus created. On the other hand, an executory trust is where an estate is conveyed to a trustee upon trust, to be by him conveyed or settled upon other trusts in certain contingencies, or upon certain events, and these other trusts are imperfectly stated, or mere outlines of them are stated, to be afterwards drawn out in a formal manner, and are to be carried into effect according to the final form which the details and limitations shall take under the direction thus given. They are called executory, not because the trust is to be performed in the future, but because the trust instrument itself is to be moulded into form and perfected according to the outlines or instructions made or left by the settlor or testator."

The trust in the case at bar would be executory with respect to the statute of uses. The test whether the trust is active or passive is: Has the trustee any duty to do the performance of which requires that the legal title shall remain in him? If so, the trust is active and executory under the statute. If not, it is passive and executed under the statute. Holmes v. Pickett, 51 S. C. 280, 29 S. E. 82. The duty of the trustee to convey to the appointee by the will of the life tenant required that the trustee hold the legal title at least until it was ascertained that there was default of appointment. While there are authorities elsewhere that a simple direction to "convey" in a trust fully and plainly declared does not make the trust executory, the authorities in this state warrant the conclusion that the duty to "convey" in a case like this will prevent the execution of the trust in the remaindermen under the statute until after the death of the life tenant. McCaw v. Galbraith, 7 Rich. Law, 80; Huckabee v. Newton, 23 S. C. 295; Ayer v. Ritter, 29 S. C. 136, 7 S. E. 53. See, also, Wilson v. Cheshire, 1 McCord, Eq. 233, and Holmes v. Pickett, 51 S. C. 280, 29 S. E. 82, which recognize the duty to convey as an active duty requiring that the legal title shall remain in the trustee, at least for the performance of the duty to convey the fee upon termination of the life estate. It may be conceded that the statute executed the use for life in the life tenant, and that the equitable estate of the life tenant was

thereby immediately on the execution of the deed transformed into a legal estate for life with general power of appointment by will, but it was necessary for the fee to remain in the trustee to execute the trust, depending on the contingency of the life tenant designating the beneficiary by his will. As the trust would be executory under the statute of uses, we see no good reason for holding it not executory when considering the application of the rule in Shelley's Case. The case of Cushing v. Blake, 30 N. E. Eq. 689, cited by appellants, strongly supports their contention, but in New Jersey, as well as in some other jurisdictions, it is held that the duty of the trustee to convey is not sufficient to render the trust executory in the true sense, whereas in this state such duty is regarded as active and executory, and the trend of our cases is to regard that which is executory under the statute as executory when considering the applicability of the rule in Shelley's Case. Further, in order for the rule in Shelley's Case to apply, the estate for life and the estate in remainder must be of the same quality, both legal or both equitable, otherwise they cannot coalesce. Our cases show that the statute may execute the use in either the life tenant for life, or the remainderman in remainder, according as it may be determined whether the trustee has any active duty to perform with respect to either, rendering it necessary that the life estate or the fee should remain in the trustee. Howard v. Henderson, 18 S. C. 184; Young v. McNeill, 78 S. C. 150, 59 S. E. 986; Breeden v. Moore, 82 S. C. 539, 64 S. E. 604. The trustee having no duty to perform with respect to the life tenant in this case immediately on the execution of the deed, the equitable estate of the life tenant becomes legal by the "potential magic" of the statute, but, it being necessary for the trustee to retain the legal fee in remainder during the lifetime of the life tenant to carry out the purpose of the trust, the estate in remainder, not being executed, remained executory and equitable; hence the rule in Shelley's Case could not apply when the deed was delivered because of the difference in the quality of the two estates. If we consider whether the rule should apply on the death of the life tenant without exercising the power of appointment, and should hold that the statute then executed the use in those who answered the description of heirs at law of John G. Steele, it would only follow that such heirs then became

vested with the fee in remainder as a legal estate which had not previously coalesced with the estate for life, and could not then coalesce with an extinct estate. In such case the intention of the settlor is not defeated by the rule, but those answering the description of heirs of John G. Steele at his death take, not by inheritance from the ancestor, but as purchasers under the grant of John G. Steele, Sr., in accordance with the manifest intention of the grantor.

The judgment of the circuit court is affirmed.

CHAPTER XIV.

LIFE ESTATES.

Duty of Life Tenant to Pay Taxes.

JENKS v. HORTON.

96 Mich. 13, 55 N. W. 372. 1893.

Bill by William L. Jenks against Rebecca Horton to establish a lien for taxes paid by complainant on certain premises, and to compel the payment of other taxes assessed on said premises. Decree for complainant. Defendant appeals. Modified and affirmed.

The agreed facts in this case are as follows: (1) Prior to May 8, 1869, the ownership of the land was in Rebecca Horton, a widow of Nelson D. Horton, deceased, and Carlos D. Horton and Mary E. Beard, the children and heirs at law of Nelson D. Horton, and that the property was the homestead of Nelson D. Horton. (2) May 8, 1869, the said Carlos D. Horton and Mary E. Beard gave to Rebecca Horton a life lease of said premises. (3) By sundry and mesne conveyances the title of Carlos D. Horton was conveyed to Francis S. Farrand. (4) May 22, 1884, Frances S. Farrand conveyed the interest acquired from Carlos D. Horton to Etta M. Beard, and upon the same day the same Etta M. Beard gave to B. C. Farrand a mortgage on the entire reversion for $918.90, to secure the purchase price of the interest conveyed to her; that said mortgage contained a covenant on the part of the mortgagor to pay all taxes assessed upon said premises. (5) Said mortgage was assigned June 16, 1884, to George S. Barrett and by him foreclosed for the interest accrued and unpaid; the sale taking place February 27, 1886, and a sheriff's deed being made to George S. Barrett. Redemption expired. (6) May 7, 1887, the said George S. Barrett conveyed, by ordinary quitclaim, the said premises to B. C. Farrand and W. L. Jenks, and on the 18th day of September, 1889, the said

Barrett executed in person a conveyance by quitclaim, in usual form, of the said premises to the same grantees, and the same Farrand conveyed by ordinary warranty deed, except as against existing tax claims and mortgages, his interest in the said premises to Sheldon A. Wood, on September 23, 1889, and after the filing of the original bill in this case the said Sheldon A. Wood conveyed, without covenants, his interest in the said premises to complainant. (7) September 20, 1886, the said George S. Barrett redeemed the said premises from the sale made for unpaid taxes of 1882 and 1883, paying therefor, for the taxes of 1882, the sum of $84.90, and, for the taxes of 1883, $71.14. (8) September 27, 1887, the said B. C. Farrand and W. L. Jenks redeemed for the taxes of 1884, paying therefor $62.94; September 25, 1888, the said parties redeemed for the taxes of 1885, paying therefor $68.70; September 27, 1889, the said Jenks and Wood redeemed for the taxes of 1886, paying therefor $71.56; and all the rights of said Barrett for taxes paid were transferred to said Farrand and Jenks and the rights of said Ferrand and Jenks transferred to Jenks and Wood, and the rights of said Wood transferred to said complainant by assignment.

(9) At the time of filing the original bill there were the ordinary city, state and county taxes assessed upon said premises for the years of 1887, 1888, and 1889, in all amounting to upwards of $161, unpaid. (10) Said Rebecca Horton has occupied a portion of the premises continuously since the life-lease given to her in May, 1869, and has not paid any taxes assessed thereon, beginning with the year 1882. (11) From September 1, 1885, to January 20, 1890, Etta M. Beard and her family occupied the property described in the bill as a home; Mrs. Horton also living there during the same time. The court entered a decree that the complainant had a lien upon the life estate of the defendant for the taxes of 1882 to 1886, inclusive, which had been paid by the complainant and his assignors, and for the unpaid taxes of 1887, 1888, 1889: that she pay the amount of such taxes within 60 days after service upon her of a certified copy of the decree, and that, in default thereof, her interest be sold by the sheriff of the county, in the manner provided for the sale of real estate on execution for the taxes to and including the year 1886; and that, in default of the payment of

the taxes for the subsequent years above named, a receiver be appointed to receive the rents and profits of the premises for the purpose of paying such taxes.

GRANT, J. (after stating the facts). Defendant's counsel insist (1) that complainant has no lien or right of action for the taxes prior to and including 1886; that (2) under our system of taxation complainant is not entitled to a receiver for the unpaid taxes.

1. It is conceded that the law imposes upon a life tenant the duty to pay the taxes assessed upon the land. It is insisted, however, that the personal covenant of the reversioner in the mortgage to Frances S. Farrand to pay the taxes, and the joint occupancy of the premises by the defendant and her daughter, the reversioner, operated to relieve the defendant from the payment thereof. The defendant, however, was a stranger to the agreement between the reversioner and B. C. Farrand. The fact that a reversioner mortgages his reversion, and in the mortgage agrees with the mortgagee to pay the taxes, is not of itself a release of that duty on the part of the life tenant. Had there been a contract between the defendant and her daughter by which the daughter had agreed to pay the taxes, a different question would have been presented, which we are not now called upon to determine. A purchaser of a reversion, either by mortgage or absolute conveyance, is subrogated to all the rights of the original reversioner as against a life tenant. The agreed facts contain nothing showing any intention or agreement to release defendant from this duty to pay the taxes. The decree, therefore, covering the taxes which the complainant and his assignors have paid, is affirmed.

2. In New York the practice of appointing receivers in similar cases prevails, Cairns v. Chabert, 3 Edw. Ch. 312; Sidenberg v. Ely, 90 N. Y. 257; but under our method of enforcing the collection of unpaid taxes upon real estate, and under our system of foreclosing liens, we do not think the appointment of receivers the proper remedy. When it is determined by adjudication that defendant is under obligation to pay the taxes, it is quite probable that she will do so. The appointment of a receiver is a harsh proceeding, and should be resorted to only in extreme cases. In this respect the decree will be modified. The

taxes, however, for the years named are past due, and, if not paid within 60 days after service upon the defendant of a certified copy of this decree, the complainant may pay them, and include the amount thereof in the sale ordered by this decree. The complainant will recover costs of court below, and the defendant costs of this court.

The other justices concurred.

CHAPTER XV.

RESTRAINTS ON ALIENATION.

The Right of Alienation Is an Incident to a Fee Simple Estate and Cannot Generally Be Restricted.

BLACKSTONE BANK v. DAVIS.

21 Pick. 42 (Mass.). 1838.

The defendant claimed title under the following clause in his father's will:

"I give to Erastus, my son, the use of the Bartlett farm in Millbury containing about 120 acres. Said farm is not to be subject or liable to conveyance or attachment."

WILDE, J. This is an action of trespass quare clausum fregit, and the only question submitted by the facts agreed is the question of title, the breaking and entering of the close by the defendant being admitted. It is not questioned that the devise respecting the Bartlett farm is a good devise to pass the farm to the devisee. By the devise of the profits, use or occupation of land, the land itself is devised. Whether the defendant took an estate in fee or for life only, is a question not material in the present case. The sole question is, whether the estate in his hands was liable to attachment and to be taken in execution as his property. The plaintiffs claim title under the levy of an execution against the defendant, and their title is valid if the estate was liable to be so taken. That it was so liable, notwithstanding the proviso or condition in the will, the Court cannot entertain a doubt.

A condition in a grant or devise, that the grantee or devisee shall not alienate, is void because repugnant to the estate: Co. Lit. 223 a. And so it is as to a condition annexed to a gift or sale of a term for years, or any other chattel real or personal. A condition or proviso to restrain or prohibit the operation of an attachment and levy of an execution, is void for the same reason,

and because it is contrary to law which makes a man's property liable for the payment of his debts. A condition that the grantee or devisee shall not alienate for a particular time or to a particular person or persons is good. So, in a devise to a minor provided he shall not come into possession, occupy, or have any advantage of the estate during his minority except through his guardian, who is to lease, occupy, and improve the estate, the proviso is good and valid in law: Smithwick v. Jordan, 15 Mass. R. 113.

The clause in the devise under consideration is without any limitation, and declares that the property devised shall not be subject to conveyance or attachment perpetually. Such a declaration or provision the testator had no authority to make. It was an attempt to impose a restraint upon property which the law will not allow, and the provision is clearly void.

Defendant defaulted.

Spendthrift Trusts.

NICHOLS v. EATON.

91 U. S. 716. 1875.

Appeal from the Circuit Court of the United States for the District of Rhode Island.

The controversy in this case arises on the construction and legal effect of certain clauses in the will of Mrs. Sarah B. Eaton. At the time of her death, and at the date of her will, she had three sons and a daughter; being herself a widow, and possessed of large means of her own. By her will she devised her estate, real and personal, to three trustees, upon trusts to pay the rents, profits, dividends, interest, and income of the trust-property to her four children equally, for and during their natural lives, and, after their decease, in trust for such of their children as shall attain the age of twenty-one, or shall die under that age having lawful issue living; subject to the condition that if any of her children should die without leaving any child who should survive the testatrix and attain the age of twenty-one years, or die under that age leaving lawful issue living at his or her decease, then, as to the share or respective shares, as well original as accruing, of such child or children respectively, upon the

trusts declared in said will concerning the other share or respective shares. The will also contained a provision, that if her said sons respectively should alienate or dispose of the income to which they were entitled under the trusts of the will, or if, by reason of bankruptcy or insolvency, or any other means whatsoever, said income could no longer be personally enjoyed by them respectively, but the same would become vested in or payable to some other person, then the trust expressed in said will concerning so much thereof as would so vest should immediately cease and determine. In that case, during the residue of the life of such son, that part of the income of the trust-fund was to be paid to the wife and children, or wife or child, as the case might be, of such son; and, in default of any objects of the last-mentioned trust, the income was to accumulate in augmentation of the principal fund.

There is another proviso, which, as it is the main ground of the present litigation, is here given verbatim, as follows:

"Provided also, that in case at any future period circumstances should exist, which, in the opinion of my said trustees, shall justify or render expedient the placing at the disposal of my said children respectively any portion of my said real and personal estate, then it shall be lawful for my said trustees, in their discretion, but without its being in any manner obligatory upon them, to transfer absolutely to my said children respectively, for his or her own proper use and benefit, any portion not exceeding one-half of the trust-fund from whence his or her share of the income under the preceding trusts shall arise; and, immediately upon such transfer being made, the trusts hereinbefore declared concerning so much of the trust-fund as shall be so transferred shall absolutely cease and determine; and in case after the cessation of said income as to my said sons respectively, otherwise than by death, as hereinbefore provided for, it shall be lawful for my said trustees, in their discretion, but without its being obligatory upon them, to pay to or apply for the use of my said sons respectively, or for the use of such of my said sons and his wife and family, so much and such part of the income to which my said sons respectively would have been entitled under the preceding trusts in case the forfeiture hereinbefore provided for had not happened."

The daughter died soon after the mother, without issue, and

unmarried. Amasa M. Eaton, one of the sons of the testatrix, failed in business, and made a general assignment of all his property to Charles A. Nichols for the benefit of his creditors, in March, 1867; and in December, 1868, was, on his own petition, declared a bankrupt, and said Nichols was duly appointed his assignee in bankruptcy. Said Amasa was then, and during the pendency of this suit, unmarried, and without children. He, William M. Bailey, and George B. Ruggles (a son of testatrix by a former husband), were the executors and trustees of the will.

It will be seen at once, that whether regard be had to the assignment before bankruptcy, or to the effect of the adjudication of bankruptcy, and the appointment of Nichols as assignee in that proceeding, one of the conditions had occurred on which the will of Mrs. Eaton had declared that the devise of a part of the income of the trust estate to Amasa M. Eaton should cease and determine; and, as he had no wife or children in whom it could vest, it became, by the alternative provision of the will, a fund to accumulate until his death, or until he should have a wife or child who could take under the trust.

But Nichols, the assignee, construing the whole of the will together, and especially the proviso above given verbatim, to disclose a purpose, under cover of a discretionary power, to secure to her son the right to receive to his own use the share of the income to which he was entitled before the bankruptcy, in the same manner afterwards as if that event had not occurred, brought this bill against the said executors and trustees to subject that income to administration by him as assignee in bankruptcy for the benefit of the creditors.

Upon a final hearing the Circuit Court dismissed the bill, and Nichols appealed to this court.

Mr. Justice Miller, after stating the case, delivered the opinion of the court.

The claim of the assignee is founded on the proposition, ably presented here by counsel, that a will which expresses a purpose to vest in a devisee either personal property, or the income of personal or real property, and secure to him its enjoyment free from liability for his debts, is void on grounds of public policy, as being in fraud of the rights of creditors, or as expressed by Lord Eldon in Brandon v. Robinson, 18 Ves. 433, "If prop-

erty is given to a man for his life, the donor cannot take away the incidents of a life-estate."

There are two propositions to be considered as arising on the face of this will, as applicable to the facts stated: 1. Does the true construction of the will bring it within that class of cases, the provisions of which on this point are void under the principle above stated? and 2. If so, is that principle to be the guide of a court of the United States sitting in chancery?

Taking for our guide the cases decided in the English courts, the doctrine of the case of Brandon v. Robinson seems to be pretty well established. It is equally well settled that a devise of the income of property, to cease on the insolvency or bankruptcy of the devisee, is good, and that the limitation is valid. Demmill v. Bedford, 3 Ves. 149; Brandon v. Robinson, 18 Id. 429; Rochford v. Hackman, 9 Hare; Lewin on Trusts, 80, ch. vii, sect. 2; Tillinghast v. Bradford, 5 R. I. 205.

If there had been no further provision in regard to the matter in this will than that on the bankruptcy or insolvency of the devisee, the trust as to him should cease and determine; or if there had been a simple provision, that, in such event, that part of the income of the estate should go to some specified person other than the bankrupt, there would be no difficulty in the case. But the first trust declared after the bankruptcy for this part of the income is in favor of the wife, child, or children of such bankrupt, and in such manner as said trustees in their discretion shall think proper. If the bankrupt devisee had a wife or child living to take under this branch of the will, there does not seem to be any doubt that there would be nothing left which could go to his assignee in bankruptcy. The cases on this point are well considered in Lewin on Trusts, above cited; and the doctrine may be stated, that a direction that the trust to the first taker shall cease on his bankruptcy and shall then go to his wife or children, is valid, and the entire interest passes to them; but that if the devise be to him and his wife or children, or if he is in any way to receive a vested interest, that interest, whatever it may be, may be separated from those of his wife or children, and be paid over to his assignee. Page v. Way, 3 Beav. 20; Perry v. Roberts, 1 Myl. & K. 4; Rippon v. Norton, 2 Beav. 63; Lord v. Bunn, 2 You. & Coll. Ch. 98. Where, however, the devise over is for the support of the bankrupt and his family, in such manner

as the trustees may think proper, the weight of authority in England seems to be against the proposition that anything is left to which the assignee can assert a valid claim. Twopeny v. Peyton, 10 Sim. 487; Godden v. Crowhurst, Id. 642.

In the case before us, the trustees are authorized, in the event of the bankruptcy of one of the sons of testatrix without wife or children (which is the condition of the trust as to Amasa M. Eaton), to loan and reinvest that portion of the income of the estate in augmentation of the principal sum or capital of the estate until his decease, or until he shall have wife or children capable of receiving the trust of the testatrix forfeited by him.

There does not seem, thus far, any intention to secure or revest in the bankrupt any interest in the devise which he had forfeited; and there can be no doubt, that, but for the subsequent clauses of the will, there would be nothing in which the assignee could claim an interest. But there are the provisions, that the trustees may, at their discretion, transfer at any time to either of the devisees the half or any less proportion of the share of the fund itself which said devisee would be entitled to if the whole fund were to be equally distributed; and the further provision, that, after the cesser of income provided for in case of bankruptcy or other cause, it shall be lawful, but not obligatory on her said trustees, to pay to said bankrupt or insolvent son, or to apply for the use of his family, such and so much of said income as said son would have been entitled to in case the forfeiture had not happened.

It is strongly argued that these provisions are designed to evade the policy of the law already mentioned; that the discretion vested in the trustees is equivalent to a direction, and that it was well known it would be exercised in favor of the bankrupt. * * *

No case is cited, none is known to us, which goes so far as to hold that an absolute discretion in the trustee—a discretion which, by the express language of the will, he is under no obligation to exercise in favor of the bankrupt—confers such an interest on the latter, that he or his assignee in bankruptcy can successfully assert it in a court of equity or any other court.

As a proposition, then, unsupported by any adjudged case, it does not commend itself to our judgment on principle. Conceding to its fullest extent the doctrine of the English courts,

their decisions are all founded on the proposition that there is somewhere in the instrument which creates the trust a substantial right, a right which the appropriate court would enforce, left in the bankrupt after his insolvency, and after the cesser of the original and more absolute interest conferred by the earlier clauses of the will. This constitutes the dividing-line in the cases which are apparently in conflict. Applying this test to the will before us, it falls short, in our opinion, of conferring any such right on the bankrupt. Neither of the clauses of the provisos contain anything more than a grant to the trustees of the purest discretion to exercise their power in favor of testatrix's sons. It would be a sufficient answer to any attempt on the part of the son in any court to enforce the exercise of that discretion in his favor, that the testatrix has in express terms said that such exercise of this discretion is not "in any manner obligatory upon them,"—words repeated in both these clauses. To compel them to pay any of this income to a son after bankruptcy, or to his assignee, is to make a will for the testatrix which she never made; and to do it by a decree of a court is to substitute the discretion of the chancellor for the discretion of the trustees, in whom alone she reposed it. When trustees are in existence, and capable of acting, a court of equity will not interfere to control them in the exercise of a discretion vested in them by the instrument under which they act. Hill on Trustees, 486; Lewin on Trusts, 538; Boss v. Goodsall, 1 Younge & Collier, 617; Maddison v. Andrew, 1 Ves. Sr. 60. And certainly they would not do so in violation of the wishes of the testator.

But, while we have thus attempted to show that Mrs. Eaton's will is valid in all its parts upon the extremest doctrine of the English Chancery Court, we do not wish to have it understood that we accept the limitations which that court has placed upon the power of testamentary disposition of property by its owner. We do not see, as implied in the remark of Lord Eldon, that the power of alienation is a necessary incident to a life-estate in real property, or that the rents and profits of real property and the interest and dividends of personal property may not be enjoyed by an individual without liability for his debts being attached as a necessary incident to such enjoyment. This doctrine is one which the English Chancery Court has engrafted upon the

common law for the benefit of creditors, and is comparatively of modern origin. We concede that there are limitations which public policy or general statutes impose upon all dispositions of property, such as those designed to prevent perpetuities and accumulations of real estate in corporations and ecclesiastical bodies. We also admit that there is a just and sound policy peculiarly appropriate to the jurisdiction of court of equity to protect creditors against frauds upon their rights, whether they be actual or constructive frauds. But the doctrine, that the owner of property, in the free exercise of his will in disposing of it, cannot so dispose of it, but that the object of his bounty, who parts with nothing in return, must hold it subject to the debts due his creditors, though that may soon deprive him of all the benefits sought to be conferred by the testator's affection or generosity, is one which we are not prepared to announce as the doctrine of this court.

If the doctrine is to be sustained at all it must rest exclusively on the rights of creditors. Whatever may be the extent of those rights in England, the policy of the states of this Union, as expressed both by their statutes and the decisions of their courts, has not been carried so far in that direction. * * *

Nor do we see any reason, in the recognized nature and tenure of property and its transfer by will, why a testator who gives, without any pecuniary return, who gets nothing of property value from the donee, may not attach to that gift the incident of continued use, of uninterrupted benefit of the gift, during the life of the donee. Why a parent, or one who loves another, and wishes to use his own property in securing the object of his affection, as far as property can do it, from the ills of life, the vicissitudes of fortune, and even his own improvidence, or incapacity for self-protection, should not be permitted to do so, is not readily perceived.

These views are well supported by adjudged cases in the state courts of the highest character. * * *

We are not called upon in this connection to say how far we would feel bound, in a case originating in a state where the doctrine of the English courts had been adopted so as to become a rule of property, if such a proposition could be predicated of a rule like this. Nor has the time which the pressure of business in this court authorizes us to devote to this case permitted any

further examination into the decisions of the state courts. We have indicated our views in this matter rather to forestall the inference that we recognize the doctrine relied on by appellants, and not much controverted by opposing counsel, than because we have felt it necessary to decide it, though the judgment of the court may rest equally well on either of the propositions which we have discussed. We think the decree of the court below may be satisfactorily affirmed on both of them.

Other objections have been urged by counsel, such as that the bankrupt is himself one of the trustees of the will, and will exercise his discretion favorably to himself. But there are two other trustees, and it requires their joint action to confer on him the benefits of this trust. It is said that one of them is mentally incompetent to act; but this is not established by the testimony. It is said also that, since his bankruptcy, the defendant, Amasa, has actually received $25,000 of this fund; and that should go to the assignee, as it shows conclusively that the objections to the validity of the will were well founded.

But the conclusive answer to all these objections is, that, by the will of decedent—a will which, as we have shown, she had a lawful right to make—the insolvency of her son terminated all his legal vested right in her estate, and left nothing in him which could go to his creditors, or to his assignees in bankruptcy or to his prior assignee; and that what may have come to him after his bankruptcy through the voluntary action of the trustees, under the terms of the discretion reposed in them, is his lawfully, and cannot now be subjected to the control of his assignee.

Decree affirmed.

CHAPTER XVI.

ESTATES UPON CONDITION.

Restriction on Use of Land.

COWELL v. COLORADO SPRINGS CO.

100 U. S. 55. 1879.

FIELD, J. In May, 1873, the plaintiff in the court below, the Colorado Springs Company, sold and conveyed to the defendant, Cowell, two parcels of land, situated in the town of Colorado Springs, in the then Territory of Colorado. The deed of conveyance stated that the consideration of its execution was $250, and an agreement between the parties that intoxicating liquors should never be manufactured, sold, or otherwise disposed of as a beverage in any place of public resort on the premises. And it was expressly declared that in case this condition was broken by the grantee, his assigns or legal representatives, the deed should become null and void, and the title to the premises conveyed should revert to the grantor; and that the grantee in accepting the deed agreed to this condition. The defendant went into possession of the premises under the deed, and soon afterward opened a billiard saloon in a building thereon, which became a place of public resort, where he sold and disposed of intoxicating liquors as a beverage. The grantor thereupon brought the present action of ejectment for the possession of the premises, the title to which, it claimed, had reverted to it upon breach of the condition contained in its deed; and it recovered judgment. It does not appear that the company had made any previous entry upon the premises or any demand for their possession.

The principal questions, therefore, for our determination are the validity of the condition, and, on its breach, the right of the plaintiff to maintain the action without previous entry or demand of possession.

The validity of the condition is assailed by the defendant as repugnant to the estate conveyed. His contention is, that as the granting words of the deed purport to transfer the land, and the entire interest of the company therein, he took the property in absolute ownership, with liberty to use it in any lawful manner which he might choose. With such use the condition is inconsistent, and he therefore insists that it is repugnant to the estate granted. But the answer is, that the owner of property has a right to dispose of it with a limited restriction on its use, however much the restriction may affect the value or the nature of the estate. Repugnant conditions are those which tend to the utter subversion of the estate, such as prohibit entirely the alienation or use of the property. Conditions which prohibit its alienation to particular persons or for a limited period, or its subjection to particular uses, are not subversive of the estate: they do not destroy or limit its alienable or inheritable character: Sheppard's Touchstone, 129, 131. The reports are full of cases where conditions imposing restrictions upon the uses to which property conveyed in fee may be subjected have been upheld. In this way slaughter-houses, soap factories, distilleries, livery stables, tanneries, and machine shops have, in a multitude of instances, been excluded from particular localities, which, thus freed from unpleasant sights, noxious vapors, or disturbing noises, have become desirable as places for residences of families. To hold that conditions for their exclusion from premises conveyed are inoperative would defeat numerous arrangements in our large cities for the health and comfort of whole neighborhoods.

The condition in the deed of the plaintiff against the manufacture or the sale of intoxicating liquors as a beverage at any place of public resort on the premises was not subversive of the estate conveyed. It left the estate alienable and inheritable, and free to be subjected to other uses. It was not unlawful nor against public policy, but, on the contrary, it was imposed in the interest of public health and morality.

A condition in a deed, not materially different from that under consideration here, was held valid and not repugnant to the grant by the Court of Appeals of New York in Plumb v. Tubbs, 41 N. Y. 442. And a similar condition was held by the Supreme Court of Kansas to be a valid condition subsequent,

upon the continued observance of which the estate conveyed depended: 14 Kan. 61. * * *

We have no doubt that the condition in the deed to the defendant here is valid and not repugnant to the estate conveyed. It is a condition subsequent, and upon its breach the company had a right to treat the estate as having reverted to it, and bring ejectment for the premises. A previous entry upon the premises, or a demand for their possession, was not necessary. By statute in Colorado it is sufficient for the plaintiff in ejectment to show a right to the possession of the demanded premises at the commencement of the action as heir, devisee, purchaser, or otherwise. The commencement of the action there stands in lieu of entry and demand of possession. * * *

The other objections urged to the title of the plaintiff are equally untenable. It seems that its title is derived through mesne conveyances from one Lamborn, to whom, in September, 1870, a patent of the United States was issued embracing the demanded premises. This patent adds to Lamborn's name the word "trustee," without mention of any trust upon which he is to hold the property. It is therefore contended that he must be considered as holding it for some undeclared use of the grantor, and that consequently he could not convey it without the consent or direction of the latter, in this case the government. But the answer to this position is given in the patent itself, by the recital that the land was purchased by the patentee of the government, thus negativing the inference that the latter retained any interest in the property or advanced the purchase money. And besides, if any trust was in fact created, it was for the cestui que trust, and no one else, to complain of the action of the patentee and enforce the trust: it did not prevent the legal title from passing by his conveyance: Perry, Trusts, § 334.

In March, 1872, the patentee conveyed the premises to the National Land Improvement Company of El Paso County, Colorado, a corporation created under the laws of Pennsylvania, with power to receive, hold, and grant real and personal property; explore, locate, and improve lands; transport emigrants and merchandise; construct houses and buildings; manufacture, trade, and traffic; colonize, organize, and form settlements; operate mineral and other lands, and improve and work the same, provided such lands be located in Utah, Arizona, or ad-

joining states and territories lying west of the Mississippi; and to do such acts as should be necessary to promote the success of the corporation and the public good. The defendant contends that this corporation, invested with these extensive powers to settle up the country and advance its own interests and the public welfare, had not the capacity to act in the territory of Colorado and to hold and convey real property there. By the law of March 2, 1867, then in force, the Legislatures of the several territories of the country were prohibited from granting private charters, and were only authorized to create by general law corporations for mining, manufacturing, and other industrial pursuits: 14 Stat. 426. His position is that Congress intended to prevent the creation of corporations like this one of Pennsylvania, as the extensive powers granted to it tended to monopolize landed estates for purposes of speculation, and thereby injure the agricultural, mining, and manufacturing interests of the country; and if a domestic corporation could not be created with such powers for reason of public policy, a foreign corporation could not for like reasons be permitted to exercise them in the Territory. The answer to this position is found in the general comity which, in the absence of positive direction to the contrary, obtains through the states and territories of the United States, by which corporations created in one state or territory are permitted to carry on any lawful business in another state and territory, and to acquire, hold, and transfer property there equally as individuals. If the policy of the state or territory does not permit the business of the foreign corporation in its limits, or allow the corporation to acquire or hold real property, it must be expressed in some affirmative way; it cannot be inferred from the fact that its Legislature has made no provision for the formation of similar corporations, or allows corporations to be formed only by general law. Telegraph companies did business in several states before their Legislatures had created or authorized the creation of similar corporations; and numerous corporations existing by special charter in one state are now engaged, without question, in business in states where the creation of corporations by special enactment is forbidden.

The National Land and Improvement Company, the day following the receipt of the deed of Lombard, conveyed the premises to the plaintiff, the Colorado Springs Company. This company

was incorporated in 1871 for the purpose of aiding, encouraging, and inviting immigration to the territory, and to purchase, hold, and dispose of lands, town lots, mineral springs, and other property, also to construct and operate ditches, wagonroads, and railroads, and mills for manufacturing lumber, and generally to do all things authorized by the laws of the territory which might tend to accomplish the purposes stated. At that time the Legislature was restricted, as already mentioned, in its power to create by general law corporations. It was not empowered to authorize the formation of companies to aid and encourage immigration, and for that purpose to take, possess, and convey real property in the territory. Therefore the defendant contends that the company could not acquire a right to the premises in controversy. But the answer to this position is, that, for some of the purposes designated in the articles of incorporation, the law in existence authorized the incorporation of companies; therefore the incorporation here was not wholly illegal: a corporate body competent to exercise some of the powers mentioned was created, and under the statute of the territory could acquire and hold or convey, by deed or otherwise, any real or personal estate whatever, necessary to enable it to carry on its business. Whether the particular premises in controversy are necessary for that business is not important; that is a matter between the government of the state, succeeding that of the territory, and the corporation, and is no concern of the defendant. It would create great inconvenience and embarrassment if, in actions by corporations to recover the possession of their real property, an investigation was permitted into the necessity of such property for the purposes of their incorporation, and the title made to rest upon the proof of that necessity: Natoma Water and Mining Co. v. Clarkin, 14 Cal. 552.

But there is another, and general answer to this objection. The defendant, as already stated, went into possession of the premises in controversy under the deed of the plaintiff. He took his title from the company with a condition that if he manufactured or sold intoxicating liquors, to be used as a beverage, at any place of public resort on the premises, the title should revert to his grantor; and he is therefore estopped, when sued by the grantor for the premises, upon breach of this condition, from denying the corporate existence of the plaintiff, or the

validity of the title conveyed by its deed. Upon obvious principles, he cannot be permitted to retain the property which he received upon condition that it should be restored to his grantor on a certain contingency, by denying, when the contingency has happened, that his grantor ever had any right to it: Gill v. Fauntleroy, 8 B. Mon. (Ky.) 185; Miller v. Shackleford, 4 Dana (Ky.), 287, 288; Fitch v. Baldwin, 17 Johns. (N. Y.) 161.

Judgment affirmed.

CHAPTER XVII.

USES.

History.

BACON, USES, 22.

The experience and practice of uses were not ancient, and my reasons why I think so are these four: First, I cannot find in any evidence before King R. II. his time, the clause ad opus et usum, and the very Latin of it savoureth of that time; for in ancient time, about Edw. I. and before, when lawyers were part civilians, the Latin phrase was much purer, as you may see partly by Bracton's writing, and by ancient patents and deeds, and chiefly by the register of writs, which is good Latin, whereas this phrase ad opus et usum, and the words ad opus, is a barbarous phrase, and like enough to be the penning of some chaplain that was not much past his grammar, where he had found opus and usus coupled together, and that they did govern an ablative case; as they do indeed since this statute, for they take away the land and put them into a conveyance.

Statute of Uses Applied to Trusts.

STEELE v. SMITH.

(See page 637.)

LEAKE, DIGEST OF LAND LAW, 112, 113.

The limitation of uses is not restricted by the doctrines of common law concerning the seisin; and, therefore, a use for a freehold estate may be limited to arise in futuro or upon a contingency without any prior limitation to support it as a remainder. Thus a conveyance of the immediate legal possession may be made to the use of a person and his heirs, after four years, or after the death of the grantor, or to such uses as the grantor shall appoint by will. 1 Sanders on Uses, 136; Gilbert

on Uses, by Sugden, 153, 161; Clere's Case, 6 Co. 18a; Davies v. Speed, 2 Salk. 675, per Holt, C. J. So, a bargain and sale might be made to the use of another after four years; so, a covenant to stand seised to the use of another after the covenantor's death. Roe v. Tranner, 2 Wills. 75; Doe v. Prince, 20 L. J. C. P. 223.

In all such cases of uses to arise in futuro, the use, being undisposed of except at the time or in the event specified, results or remains in the grantor or covenantor in fee simple as before, until the future use arises to displace it; the use does not result or remain for a particular estate only, so as to convert such limitations into remainders. Bacon on Uses, Rowe's ed., note (137); Gilbert on Uses, by Sugden, 161, 162; 1 Hayes Conv. 464, App. ii. 2, on Resulting Uses.

A future estate in the use may also be limited to take effect in substitution or defeasance of a previously limited estate, and even of an estate in fee simple; for the rules of common law, not admitting of any future limitations shifting the freehold except by way of remainder, nor of any limitations after an estate in fee simple, had no application to the use. A marriage settlement is a well-known instance of such limitations; where the use is first limited to the settlor in fee, and, upon the marriage taking place, then to the uses of the settlement. 1 Sanders, Uses, 143; Gilbert on Uses, by Sugden, 153.

Future uses of the above kinds, including all such as are not limited by way of remainder, are called springing or shifting uses, the former term more especially denoting those that arise or spring up without any prior limitation; the latter denoting those that shift the use in substitution of a prior estate. Sugden's note to Gilbert on Uses, 152. Being executed by the statute, they made a great advance upon the common law in the limitation of future estates.

When Use Is Executed by Creation of Dry Trust.

JORDAN ET AL. v. PHILLIPS & CREW CO. ET AL.

126 Ala. 561. 29 So. 831. 1900.

Bill by H. C. Jordan and others against Phillips & Crew Company and others to recover certain realty, and for an ac-

counting as to the profits. From a decree for defendants, plaintiffs appeal. Affirmed.

* * * * * * * * * * *

The trust deed alleged in the bill to have been executed to Junius Jordan, as trustee, was attached to the bill as an exhibit, and, after naming the state and county, was in words and figures as follows: "Know all men by these presents that we, J. Jordan & Co., a partnership composed of Junius Jordan and F. Rosa Simonton, the said F. Rosa Simonton being joined herein by her husband, J. H. Simonton, who hereby expresses his consent for the said F. Rosa to execute this instrument, and who also joins herein for the purpose of relinquishing all rights which he now has or may hereafter be entitled to in and to the property hereinafter described and set forth, for and in consideration of the sum of five hundred dollars ($500) to us in hand paid by Junius Jordan, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell, and convey unto the said Junius Jordan, as trustee for H. C. Jordan, J. S. Jordan, Junius Jordan, Jr., F. Rosa Simonton, A. P. Jordan, E. Lee Jordan, and E. B. Jordan, the following described property: [Here follows description of lands conveyed which are the same as those described in the bill] to have and to hold the aforegranted premises, together with all the improvements and appurtenances thereunto belonging or in any wise appertaining to the said Junius Jordan, as trustee aforesaid, his heirs and assigns, forever. And the said Junius Jordan shall have full power and authority to sell or mortgage the same, to borrow money on the same for the purpose of the improvement thereof, to rent the same without the accountability for the rent thereof, and to make such improvements, as said trustee, as in his opinion would seem proper for, and beneficial to, the interest of the beneficiary thereof. And we do covenant with the said Junius Jordan, trustee as aforesaid, that we are lawfully seised in fee of the aforegranted premises," etc. This deed was signed by J. Jordan & Co., Junius Jordan, F. Rosa Simonton, and J. H. Simonton. The deed was filed for record in the probate court of Henry county on August 18, 1892.

* * * * * * * * * * *

DOWDELL, J. The deed attached as Exhibit A to the bill, and under which the complainants set up their claim as cestuis que trustent, has some novel features. There is no averment in

the bill as to how the estate in the lands in question was held prior to, and at the time of, the execution of this deed. The instrument purports to be a conveyance by a partnership, in the partnership name of J. Jordan & Co., but proceeds to set out the names of the individuals composing the firm, to wit, Junius Jordan and F. Rosa Simonton, and is executed in the name of the partnership J. Jordan & Co., and the individuals Junius Jordan and F. Rosa Simonton, and J. H. Simonton, the husband of the said Rosa, joining in the execution. The conveyance of the title is to Junius Jordan, as trustee for F. Rosa Simonton and other named parties, upon a recited consideration of $500 from the said Junius Jordan to the grantors. The partnership J. Jordan & Co. not being a legal entity, it could neither hold nor transmit by conveyance the legal title to land. If the land was partnership property, the legal title to the same rested in the individuals composing the firm as tenants in common. As a valid deed conveying the legal title in the land, it must, therefore, rest upon the fact of its execution by the individuals composing the partnership.

We have, then, the case presented of two grantors, each owning an undivided moiety in the land, conveying the whole to one of the grantors in trust for the other grantor and certain third parties named in the deed. That a person cannot at the same time be grantor and grantee in a conveyance of the legal title to land is obvious. The effect, therefore, of the conveyance by Junius Jordan is a declaration by him of a trust in the land for the benefit of third parties merely, and, under the statute of uses, operates a conveyance of both legal and equitable estate owned by him in the land to such third parties. When considered with reference to F. Rosa Simonton, the conveyance being "to Junius Jordan, as trustee for F. Rosa Simonton" and other parties named, imposing no active duties upon the trustee, simply making him the repository of the legal title, the trust created by the deed is nothing more than a dry, naked trust, and likewise under the statute, operates to convey the estate, both legal and equitable, to the persons named as beneficiaries. Code 1896, § 1027; You v. Flinn, 34 Ala. 409; Connell v. Cole, 89 Ala. 381, 8 South. 72.

The power mentioned in the deed, following after the habendum clause, is personal to the grantee, resting merely in his dis-

cretion. It is coupled with no duty expressed or implied, in the contract or conveyance, requiring of him its exercise. No duty being imposed by the deed, there was nothing to intercept the vesting of the legal title in the cestuis que trustent, at the time of its execution, under the statute of uses. Having, then, no title, legal or equitable, to convey, the deed he made to the appellees passed no title to them, unless it can be deduced through a valid execution of the power to sell. The averments of the bill are that the trustee "unlawfully and in violation of his trust" conveyed said property to pay his individual debt. This not being a sale and conveyance in execution of the power, the deed is void at law and passed no title to the grantees. Russell v. Russell, 36 N. Y. 581, 93 Am. Dec. 540; 27 Am. & Eng. Enc. Law, p. 232.

From the view which we have taken, it is manifest that Junius Jordan had no legal title, under the pretended trust deed, which he could convey to the respondent the Phillips & Crew Company; and the purpose of complainants' bill, being the divestiture of the legal title to the lands passing by said deed out of the said respondent and a vestiture of the same in the complainants, is without equity. For the recovery of the possession of the land, as well as for recovery of rents or damages for use and occupation, the complainants have a complete and adequate remedy at law. There was no error in sustaining the demurrer to the bill, and the decree of the chancellor must be affirmed.

CHAPTER XVIII.

EQUITABLE CONVERSION.

CURTEIS v. WORMALD.

10 Ch. Div. 172 (Eng.). 1878.

JESSEL, M. R. The point which I have to consider and to decide is this: A testator directed his trustees—for although the same persons may have been appointed executors they are for this purpose trustees, and trustees only—to lay out his residuary personal estate in the purchase of real estate, freeholds and copyholds, to be settled to certain uses, comprising a long series of limitations. The residue was ascertained, that is, the testator's debts and legacies and funeral and testamentary expenses were all paid, and then the residue was at different times laid out by the trustees, pursuant to the will, in the purchase of freehold and copyhold estates, which were conveyed so as to vest the legal estate in the trustees.

That being so, the limitation took effect to a certain extent, and then, by reason of failure of issue of the tenants for life, the ultimate limitations failed, and there became a trust for somebody. Now, for whom?

According to the doctrine of the Court of Equity, settled, if I may say so, by the well-known case of Ackroyd v Smithson, 1 Bro. C. C. 503—for it has always been the law of this court since—this kind of conversion is a conversion for the purposes of the will, and does not affect the rights of the persons who take by law independent of the will. If, therefore, there is a trust to sell real estate for the purposes of the will, and the trust takes effect, and there is an ultimate beneficial interest undisposed of, that undisposed of interest goes to the heir. If, on the other hand, it is a conversion of personal estate into real estate, and there is an ultimate limitation which fails of taking effect, the interest which fails results for the benefit of the persons entitled to the personal estate, that is, the persons who take under the Statutes of Distribution as next of kin. Their right

to the residue of the personal estate is a statutory right independent of the will.

The result is that in the case I put there is a trust for the next of kin. How any one could imagine it was a trust for anybody else it is difficult to understand; and had I not been referred to the judgment of a very eminent judge on this subject I should have said it was impossible to understand it.

There certainly is authority for saying—a single authority, and an authority standing alone—that the ultimate trust is not for the next of kin, but for the executors. Why? The executors have ceased to have anything whatever to do with the matter. They have paid over the legacy to the legatee, who happens to be a legatee-trustee, and who holds it by law, under the Statutes of Distribution, as trustee for the next of kin, and no one else. By what process of reasoning any other result can be arrived at I have been unable to discover. The decision to which I have referred is one which, to my mind, is utterly opposed to the whole law upon the subject.

Then the next question which arises is, how does the heir-at-law in the first case, or the next of kin in the second, take the undisposed of interest? The answer is, he takes it as he finds it. If the heir-at-law becomes entitled to it in the shape of personal estate, and dies, there is no equitable reconversion as between his real and personal representative, and consequently his executor takes it as part of his personal estate.

On the other hand, if the next of kin, having become entitled to a freehold estate, dies, there is no equity to change the freehold estate into anything else on his death: it will go to the devisee of real estate, or to his heir-at-law if he has not devised it, and will pass as real estate. As to that, there is no question, no doubt, no difficulty. No one has suggested any other principle, and even in the case cited—Reynolds v. Godlee, Joh. 536, 582—it was admitted that that was the principle, and the only point of difference or distinction suggested was that which appears to me to be opposed to the whole law on this subject, namely, that there was an ultimate trust for the executors, and not for the next of kin.

As that does not seem to me to have any foundation, and as it appears to me to be opposed to both principle and authority, I do not consider myself bound to follow that decision, and I may

say that I am very glad to find I can invoke the very same judgment of the very same judge for the purpose of showing that I am not bound to follow it; for, being referred to a decision of another judge—the Master of the Rolls—given several years before, he said that that decision was not obligatory upon him; but that as he thought it consonant with sense and reason, and sound law, he chose to follow it. Unfortunately I do not entertain the same view as regards this authority, and therefore I am unable to follow it.

A declaration was accordingly made "that all the real estate bought or contracted to be bought before the death of the last tenant for life passed to Edward Walker and Benjamin Walker, the next of kin of the said testator, as real estate in equal moieties, and that George Walker became entitled to one of such moieties as the devisee of the said Edward Walker, and to the other moiety as the heir-at-law of the said Benjamin Walker at his (Benjamin Walker's) death, and that both of such moieties passed to the devisees of the real estates under the will of the said George Walker."

The legal personal representative of Benjamin Walker appealed. The appeal was heard on the 20th of December.

JAMES, L. J. I have no doubt as to the proper decision to be arrived at in this case. With all deference to the judgment of Lord Hatherley, it is impossible, I think, to arrive at any other conclusion than that at which the Master of the Rolls has arrived. It was settled by Cogan v. Stephens, 5 L. J. (Ch.) 17, that what was the right rule as between the real and personal estate where land was directed to be sold, was also the right rule as between the two estates in the case where money was directed to be laid out in the purchase of land, that is to say, if the purpose for which that land was required failed, the undisposed of interest went back to the persons entitled to the personal estate. It has been urged that this means that it goes back to the executors to be dealt with as personal estate. But where there is no trust remaining to be performed, and the executors have entirely discharged themselves from every executorial duty, it is absurd to say that the undisposed of interest in the personal estate is to go back to them upon trust for the persons entitled to the personal estate; it goes directly to the persons beneficially

entitled, that is to say, to the next of kin, just as the undisposed of proceeds of the sale of real estate go to the heir-at-law. And therefore the same principle applies in both cases, which is this, that where you trace property into a man there is no equity between his different classes of representatives as to altering the position in which that property is. If it is money arising from the sale of land it remains money, that is to say, the heir-at-law of the person who has become beneficially entitled to it as heir-at-law has no right to have it reconverted into land. If it is land purchased under a direction to invest in land, the persons interested in the personal estate of the persons who have become entitled to it as next of kin have no right to have it reconverted into money. This property came to the next of kin in the shape of real estate, and their personal representatives have no equity to have it converted, but it must go to the heirs or devisees of the next of kin according as they died intestate or testate. The decision of the Master of the Rolls must be affirmed.

Mere Power of Sale Does Not Work a Conversion.

SWISHER v. SWISHER ET AL. (CITIZENS' SAVINGS BANK ET AL., Interveners).

137 N. W. 1076 (Iowa). 1912.

Appeal from District Court, Johnson County; R. P. Howell, Judge.

The opinion states the case. Affirmed in part; reversed in part. * * *

I. Turning first to the issue upon the nature of plaintiff's right, if any, in the land held by her deceased husband under a conveyance made to him by his father, Benjamin Swisher, it appears from the record that prior to his death, which occurred in 1895, Benjamin Swisher, with the apparent purpose of making an equitable distribution of his estate, conveyed a considerable quantity of land to his sons, Lovell Swisher and A. E. Swisher, by deed with covenants of warranty, but declaring therein that the conveyance was in trust for the following purposes and upon the following conditions: * * *

"(5) Said trustees, Lovell Swisher and A. E. Swisher, are also authorized and empowered to sell and convey and they have

full and complete power to sell and in them only is vested the power to sell and convey said real estate and they are empowered to pass by their deed as such trustees a full and complete title to said real estate. And in case of the death of either of said trustees the survivor is fully authorized and empowered to sell and pass the title to said real estate remaining unsold at such time. And further in case of the death of both of said trustees before the sale of any part or all of said real estate, then and in that case the authority and power to sell and convey said real estate unsold, shall pass to my legal heirs.

"(6) In case of sale of said real estate by the said trustees aforesaid or in case of their death, by heirs as aforesaid, the above note of $8,000 shall be first paid in full and in case of sale of any part of said real estate as aforesaid, as to that part sold the said Benjamin Swisher or the holder of the above eight thousand dollar mortgage shall release the part so sold from the lien of said mortgage upon the proceeds of said sale being applied upon the payment of said note aforesaid." * * *

[1] In our opinion a conveyance upon such terms does not work an equitable conversion of the property conveyed so far as the grantees are concerned. That effect follows only where by the express terms of the instrument or by necessary implication therefrom a sale of the property is imperatively required. Hanson v. Hanson, 149 Iowa, 84, 127 N. W. 1032; Darlington v. Darlington, 160 Pa. 65, 28 Atl. 503; In re Fox's Estate, 52 N. Y. 530, Am. Rep. 751; Janes v. Throckmorton, 57 Cal. 368; Neely v. Grantham, 58 Pa. 433; Cooke v. Platt, 98 N. Y. 35; 3 Pomeroy's Equity (3d Ed.) § 1160.

The deed from Benjamin Swisher unquestionably grants the power of sale, but we read it in vain to find any requirement of sale. On the contrary, it seems to treat the power of sale as discretionary only and to contemplate its indefinite continuation in the heirs of the grantor after the death of the trustees named in the deed. It is, to say the least, an open question whether such a trust is of any validity, or, if valid, whether it is more than a mere naked trust by virtue of which the trustees take no more than the legal title to the property of which the children or heirs of the grantor named in the deed are the beneficial owners. See Cooke v. Platt, supra.

CHAPTER XIX.

REMAINDERS AND REVERSIONS.

Reversion Distinguished From Remainder.

AKERS v. CLARK ET AL.

184 Ill. 136, 56 N. E. 296. 1900.

Action by Dora Akers against Mary J. Clark and others. Judgment for defendants, and plaintiff appeals. Affirmed.

PHILLIPS, J. On the 11th day of October, 1892, William Clark conveyed the W. ½ of the N. E. ¼ of section 33, township 12 N., range 7 E. of the third principal meridian, to Mary J. Clark. The deed contains the following language: "William Clark conveys and warrants to Mary J. Clark during her natural life, and at her death to revert back to my heirs." Clark died December 20, 1897, leaving, him surviving, Mary J. Clark, the grantee in that deed, his widow, and certain children and grandchildren, as his only heirs at law. On the 29th day of November, 1897, said Clark executed a will, by which he devised the fee in the premises in the deed described to his daughter Eliza Jane Snapp, subject to the life estate of Mary J. Clark, which will was duly probated. The will contains this language: "I will and devise to my beloved daughter Eliza Jane Snapp, wife of Jonathan Snapp, the farm on which I now reside, at the death of my beloved wife, Mary, in accordance with the deed above mentioned, to her and her heirs, forever." Certain of the children of Clark filed a bill for partition, making certain grandchildren and Eliza J. Snapp defendants. The latter answered, setting up the execution of the deed with the clause as stated, and averring the execution of the will, duly probated, etc. The evidence was in accordance with the answer, and, on hearing, a decree was entered dismissing the bill for want of equity. The complainants prosecute an appeal to this court, and assign as

errors the failure to render a decree for partition and the dismissal of complainants' bill.

It is stated by Washburn in his work on Real Property (volume 2, p. 242): "It is accepted as one of the dogmas of the common law that if one makes a limitation to another for life, with a remainder over, either mediately or immediately, to his heirs or the heirs of his body, the heirs do not take remainders at all, but the word 'heirs' is regarded as defining or limiting the estate which the first taker has, and his heirs take by descent, and not by purchase. So if a man by his will gives an estate to his devisee for life, with a remainder over to his own heirs, they do not, at common law, take as remainder-men by the will, but by descent as reversioners and heirs, that being regarded as the better title. The statutes in several states have changed the rule in Shelley's Case, so that in similar cases the heirs now take as remainder-men. But such a remainder is contingent during the life of the first taker." A devise giving precisely the same estate and interest in property as the devisee would take by descent if the devise had not been made is void, for the reason that a title by descent is regarded as a worthier or better title than by devise or purchase. Kellett v. Shepard, 139 Ill. 433, 28 N. E. 751, 34 N. E. 254. The grant in this case by this deed was a life estate to Mary J. Clark. The grantor could have no heirs until after his death, and by the insertion of the words, "and at her death to revert back to my heirs," the conveyance with reference to the interest remaining after the life estate ended would necessarily revert to the grantor, or by descent the reversion would pass to his heirs. This would result in exactly the same way if the words, "and at her death to revert back to my heirs," were omitted from the deed. It was not a grant of a life estate to Mary J. Clark and remainder to any person, and, it being the case that while living he could have no heirs, the fee remainder vested absolutely in the grantor, with a life estate carved thereout in favor of the grantee named in the deed.

Without, however, rejecting any word in the conveyance, by the terms of the deed the heirs would take as reversioners, and not as remainder-men. It is said in 2 Washb. Real Prop. p. 395: "At common law, if a man seised of an estate limited it to one for life, remainder to his own right heirs, they would take, not as remainder-men, but as reversioners; and it would be, moreover,

competent for him, as being himself the reversioner, after making such a limitation, to grant away the reversion." The same principle was announced in Hobbie v. Ogden, 178 Ill. 357, 53 N. E. 104, where it was held that a trust deed made to carry out a divorce decree, by carving out an equitable life estate for the use of the grantor's divorced wife, which provided that upon the termination of the life estate the trustee should reconvey to the grantor "or his heirs," does not create a remainder in any one, but merely stipulates for a reconveyance of the title, which equitably remained in the grantor subject to the trust, and that the grantor's devisee might enforce the reconveyance in equity. By the deed in this case no vested interest passed to any one but Mary J. Clark. The remainder, after the expiration of her life estate, under the law as well as under the deed, reverted to the grantor or his heirs. He, being a reversioner first in order of time, might dispose of the fee absolutely, by will or by deed. The devise to Eliza Jane Snapp passed the entire estate in reversion.

Vested and Contingent Remainders Defined.

GOLLADAY ET AL. v. KNOCK ET AL.

235 Ill. 412, 85 N. E. 649. 1908.

Partition proceedings by William Golladay and others against Catherine Knock and others. From the decree, defendants Henry H. Fuller and Ross R. Fuller appeal. Affirmed.

This is an appeal from the circuit court of Coles county in a partition proceedings in which the complainants claim an interest in the real estate in question as grandchildren and heirs of Moses Golladay. The real estate involved was owned in fee simple by George Golladay at the time of his death, which occurred on the 13th of January, 1854. The interests of the parties in the real estate depends upon the construction to be given to the second clause of the will of George Golladay. That clause is as follows: "After the payment of such debts I give, devise and bequeath unto my wife, Nancy Golladay, all my personal property and real estate, being in sections 9 and 10, in town 13, north, range 10, east, third P. M., in said county, and to her children after her death; and if the said Nancy Golladay does not have children that will live to inherit said real estate,

that the said real estate, at the death of Nancy Golladay and her children, fall to Moses Golladay and his heirs, of said county." At the time of the death of the testator, his widow, Nancy Golladay, had no children, but after the death of the testator his widow married one Johnson and had a daughter by him, who lived to be 23 years of age. This daughter died before her mother. Moses Golladay died in 1855, leaving two children, William Golladay and Mary Knock. On May 15, 1900, William Golladay executed a general warranty deed to Henry H. Fuller and Ross R. Fuller, purporting to convey the real estate described in the bill. William Golladay died January 1, 1904, intestate. Complainants are his children. Mary Knock, the only daughter of Moses Golladay, died intestate in the year 1890, leaving six children as her only heirs. John Knock, Jr., one of the children of Mary Knock, on the 27th day of February, 1904, made a warranty deed conveying his interest in the real estate involved to Henry H. Fuller. Nancy Golladay died in 1907. The court below found that Nancy Golladay took a life estate in the real estate in question under the will of George Golladay, and that Moses Golladay and his heirs took a contingent remainder, which upon the death of Nancy Golladay without leaving children surviving her, became a fee in the persons who at that time answered the description of "heirs of Moses Golladay"; that Henry H. Fuller and Ross R. Fuller took nothing under their deed from William Golladay, and said deed was by the decree of the court canceled as a cloud upon the title. The court by its decree found that the complainants are each entitled to a one-sixteenth interest in the premises in fee, and that H. H. Fuller, Jack Knock, Catherine Knock, Minnie Knock, Anna Knock, and Emma Knock are each seised of an undivided one-twelfth interest in said estate, and that no other parties have any interest therein. All of the defendants other than H. H. and R. R. Fuller claimed as heirs of Cassie Johnson, the daughter of Nancy Johnson, formerly Nancy Golladay. The court found that these parties had no interest in the premises. Henry H. and Ross R. Fuller excepted to the decree, and have perfected an appeal to this court. The errors relied on for a reversal are that the court erred in finding that the second clause of the will of George Golladay gave Moses Golladay a contingent remainder instead of a vested remainder, and that the court

erred in rendering a decree in favor of complainants, against the defendants.

VICKERS, J. (after stating the facts as above). The principal question in this case is whether the interest devised to Moses Golladay and his heirs was a vested or a contingent remainder. A vested remainder is a present interest which passes to a party to be enjoyed in future, so that the estate is invariably fixed in a determinate person after a particular estate terminates. 2 Blackstone's Com. 168; Haward v. Peavey, 128 Ill. 430, 21 N. E. 503, 15 Am. St. Rep. 120. Fearne, in his work on Remainders, on page 2, says: "An estate is vested when there is an immediate fixed right of present or future enjoyment. An estate is vested in possession when there exists a right of present enjoyment. An estate is vested in interest when there is a present fixed right of future enjoyment." A remainder is vested when a definite interest is created in a certain person, and no further condition is imposed than the determination of the precedent estate. It is not sufficient that there is a person in being who has the present capacity to take the remainder if the particular estate be presently determined. It must also appear that there are no other contingencies which may intervene to defeat the estate before the falling in of the particular estate. Smith v. West, 103 Ill. 332. In the case last above cited this court quoted with approval the language of Chancellor Walworth in Hawley v. James, 5 Paige (N. Y.) 466, as follows: "A remainder is vested in interest where the person is in being and ascertained, who will, if he lives, have an absolute and immediate right to the possession of the land upon the ceasing or failure of all the precedent estates, provided the estate limited to him by the remainder shall so long last; in other words, where the remainder-man's right to an estate in possession cannot be defeated by third persons or contingent events or by a failure of a condition precedent, if he lives, and the estate limited to him by way of remainder continues till the precedent estates are determined, his remainder is vested in interest." A contingent remainder is one limited to take effect either to a dubious and uncertain person or upon a dubious and uncertain event. This general definition has often been approved by this court. While the difference between a vested and a contingent remainder is clear enough

under the definitions as given by the authorities, still it is not always an easy matter to determine whether a particular instrument creates a vested or a contingent remainder. Thus it does not necessarily follow in all cases that every estate in remainder which is subject to a contingency or condition is a contingent remainder. The contingency or condition may be either precedent or subsequent. If the former, the estate is contingent; if the latter, the remainder is vested, subject to be divested by the happening of the condition subsequent. Haward v. Peavey, supra, and authorities there cited. To distinguish between a contingent remainder and one that is vested, subject to be divested by a condition subsequent, is often a matter of much difficulty. So far as our investigation has gone, we have found no attempt to formulate a rule on the subject, except the general rule that it is to be determined in each case as a question of construction of the instrument creating the interest.

In the case at bar both parties agree that, under the second clause of the will of George Golladay, Nancy Golladay took a life estate. The devise over to Moses Golladay and his heirs cannot be construed as vesting a present interest in fee, subject to be divested upon the death of the life tenant leaving children surviving her. The language of the testator will not bear such construction. The clearly expressed intention of the testator was to give his wife a life estate in the premises, with remainder in fee to such of her children as might be living at the time of her death. Then, to meet the possibility that his wife might die leaving no children surviving her, he made the devise over to Moses Golladay and his heirs. Here the devise over depended on a dubious and uncertain contingency; that is, the death of the life tenant without leaving children surviving her. The language of the testator that the real estate is to fall to Moses Golladay and his heirs "at the death" of the life tenant clearly indicates that the testator did not intend or contemplate a vesting of the devise over before the happening of that contingency. In other words, the testator has fixed the time and the condition under which the estate may vest, and it is not the province of courts to defeat the intention of the testator by a resort to artificial rules of construction.

Appellants place much reliance upon the case of Boatman v. Boatman, 198 Ill. 414, 65 N. E. 81. That case arose under the

following facts: The testator devised a certain portion of his real estate to his son, Emory Boatman, subject to the following condition: "The share of the real estate that my son Emory gets under this will is only a life estate. He is to have the use, rents and proceeds of said land, after paying taxes and necessary repairs, so long as he may live. At his death, if he leaves any child or children surviving him, then said land is to go to such child or children, but if he dies leaving no child or children surviving him then said lands to go to his brothers and sisters." After the death of the testator, and during the life of Emory Boatman, Clara V. Worsham, a sister of Emory Boatman, conveyed, by quitclaim deed, all of her interest in the real estate of her father, including that upon which Emory Boatman held a life estate, to four of her brothers, one of whom was Clarence E. Boatman. Clarence E. Boatman died intestate February 14, 1899, leaving no children, but leaving Ida M. Boatman, his widow. Emory Boatman died June 19, 1901, leaving no widow, child or children, or descendants of a child or children. Ida M. Boatman filed her bill for a partition, claiming that her deceased husband was seised of a vested interest in the lands in which Emory Boatman held a life estate, and that, by the death of her husband without children, she, as his widow, became seised, under the statute of descent, of one undivided half interest in the lands upon which Emory Boatman held the life estate. This court affirmed a decree sustaining the contention of the widow of Clarence E. Boatman. In that case, on page 420 of 198 Ill., page 83 of 65 N. E., a definition of a vested remainder was given, as follows: "A vested remainder is an estate to take effect after another estate for years, life or in tail, which is so limited that, if that particular estate were to expire or end in any way at the present time, some certain person who was in esse and answered the description of the remainderman during the continuance of the particular estate would thereupon become entitled to the immediate possession, irrespective of the concurrence of any collateral contingency."

This definition is not erroneous when all of the language embraced within it is properly considered. The definition, however, is very erroneous and misleading unless the modifying clause introduced by the last eight words employed is constantly kept in mind. The subsequent treatment of the question

involved in that case shows that the court applied the definition given without considering that the death of the life tenant leaving children surviving him was the "concurrence of a collateral contingency," which, under the definition given, prevented the interest of the brothers and sisters of Emory Boatman from being a vested remainder. There was in that case, as there is in the case at bar, a collateral contingency to be taken into account; that is, the death of the life tenant without leaving surviving children before the remainder could become vested. This contingency is a dubious and uncertain event. It could not be known until the death of the life tenant whether this contingency would happen; hence the remainder was contingent in the Boatman Case as it is in this. In this respect the Boatman Case is out of harmony with our previous decisions, as well as the great weight of authority outside of this state. See 24 Am. & Eng. Ency. of Law (2d Ed.) p. 418. In so far as the Boatman Case seems to lay down the rule that a devise to one with remainder in fee to his children who may survive him, with a devise over to another in case the life tenant dies leaving no children, creates a vested interest in remainder in the last devisee, that case is overruled. The case of Chapin v. Nott, 203 Ill. 341, 67 N. E. 833, in so far as it is based on the Boatman Case on this point, must be regarded as unsound. The remainder created by the devise over in such case is contingent upon the death of the life tenant without leaving children. That this is the proper construction of a clause in a will or deed is recognized by many decisions of this court, among which the following may be cited: City of Peoria v. Darst, 101 Ill. 609; Smith v. West, supra; McCampbell v. Mason, 151 Ill. 500, 38 N. E. 672; Furnish v. Rogers, 154 Ill. 570, 39 N. E. 989. In the case last above cited the clause in the will involved was as follows: "I give and bequeath to my grand-niece, Jessie Starkweather, * * * my house and two lots in Sycamore, * * * also thirty-two acres in Mayfield, DeKalb county, Ill., and $500, all of which is to go to her children should she marry. If she should die childless, then it is to be divided between her mother and the rest of my grand-nieces and nephews who will appear and give evidence of such." It was held that under the foregoing clause Jessie Starkweather took a life estate, and that the remainder created by the devise over was contingent on her

marriage and the birth of children who survive the life tenant. In disposing of that case this court, speaking by Mr. Justice Phillips, on page 571 of 154 Ill., page 990 of 39 N. E., said: "The language employed designates the children as those who take the remainder, and the estate does not vest in them, as an absolute fee-simple title to them and their heirs forever, until the death of Jessie, as it is further provided that, if she die childless, the estate is to be divided among her mother and the rest of the testator's grandnieces and nephews, etc., whose estate is contingent upon the death of Jessie without a surviving child or children or the descendants of such child or children, in which case the takers of the remainder are substituted for surviving children. By the first clause of the will Jessie Starkweather takes an estate for life in the house, lots, and land and in the $500 therein bequeathed. The remainder is a concurrent, contingent remainder with a double aspect, to be determined immediately upon the death of Jessie, as at that moment it will vest in her child or children, or the descendants of such child or children, that survive her, and, in default of such survival, the remainder would vest in the mother of Jessie and the other grandnieces and nephews of the testator"—citing Dunwoodie v. Reed, 3 Serg. & R. (Pa.) 435, and City of Peoria v. Darst, supra. The law as laid down in the Rogers Case, and the others above cited in line with it, furnishes the correct rule of decision in the case at bar. The second clause of the will of George Golladay gave his wife a life estate with a contingent remainder with a double aspect, to be determined upon the death of the life tenant. At the time of her death she left no children surviving her. The devise over to the heirs of Moses Golladay therefore took effect as a fee-simple interest upon the falling in of the life estate. The daughter of Nancy Golladay who died before her mother, and such of the heirs of Moses Golladay as pre-deceased the life tenant, had no interest in the premises. William Golladay was a son of Moses Golladay. As already shown, he made a warranty deed purporting to convey his interest in the premises to Henry H. Fuller and Ross R. Fuller several years before the death of the life tenant. Appellants contend that this deed operated as a conveyance of the interest of William Golladay, and that, if said deed was otherwise inoperative, it should be given effect, by way of estoppel, against the assertion of title by

the complainants, who are the children of William Golladay. This contention cannot be sustained. William Golladay died before the life tenant. No title ever vested in him. His children are not estopped by the covenants in this deed for the reason that they are not asserting a title by descent from their father, but are claiming under the will of George Golladay as heirs of Moses Golladay. A contingent remainder may be transferred by warranty deed, under our statute, so as to vest the title in the grantee. Hurd's Rev. St. 1905, c. 30, § 7; Wadhams v. Gay, 73 Ill. 415; Walton v. Follansbee, 131 Ill. 147, 23 N. E. 332. But, where the grantor of such an interest dies before the contingency happens upon which the estate is to vest, nothing passes by such deed. Thomas v. Miller, 161 Ill. 60, 43 N. E. 848. Had William Golladay survived the life tenant, appellants would have succeeded to his share in this estate. In that event his deed would have been binding upon him and his heirs after his death. The conveyance by John Knock, Jr., to Henry H. Fuller is valid under the authorities which nullify the deed of William Golladay. John Knock, Jr., survived the life tenant. The court below correctly held that H. H. Fuller was entitled to the share of John Knock, Jr. This is the only interest he has in this estate. The other appellant Rose R. Fuller, who claims under the deed of William Golladay, has no interest whatever.

There is no error in the decree of the circuit court. The decree will be affirmed.

Decree affirmed.

CHAPTER XX.

CONTINGENT REMAINDERS.

GOLLADAY v. KNOCK.

(See page 674.)

CHAPTER XXI.

CONDITIONAL LIMITATIONS—EXECUTORY DEVISES—SHIFTING AND SPRINGING USES.

Distinction Between Estate on Condition and Conditional Limitation—The Rule Against Perpetuities—Meaning of an Executory Devise.

PROPRIETORS OF THE CHURCH IN BRATTLE SQUARE v. GRANT ET AL.

3 Gray 142 (Mass.). 1855.

A house and land were devised to the deacons of a church and their successors forever, "upon this express condition and limitation, that is to say, that the minister or eldest minister of said church shall constantly reside and dwell in said house during such time as he is minister of said church; and in case the same is not improved for this use only, I then declare this bequest to be void and of no force, and order that said house and land then revert to my estate, and I give the same to my nephew J. H. and to his heirs forever."

BIGELOW, J. The interesting and important questions involved in the present case are now for the first time brought to our consideration. In a suit in equity between the same parties, which was pending several years ago in this Court, we were not called upon to give any construction to the clause in the will of Lydia Hancock, under which the deacons of the church in Brattle Square and their successors hold the estate now in controversy. The object of that suit was widely different from that of the present. The plaintiffs then assumed, by implication, that they were bound by the "condition and limitation" annexed to the devise, and the validity of the gift over on breach of the condition was not called in question by them. The single purpose then sought to be accomplished was to obtain authority to

sell the estate, solely on the ground that, from various causes, the occupation and use of the premises for a private dwelling, and especially for a parsonage, in the manner prescribed in the will, had become onerous and impracticable; and the prayer of the bill was that if a sale was authorized the proceeds might be invested in other real estate, to be held on the same trusts and upon the like condition and limitation as are set out and prescribed in the will of the testatrix, relative to the estate therein devised to the deacons and their successors. It is quite obvious that on a bill thus framed no question could arise concerning the respective titles of the parties to the suit under the devise. They were not put in issue by the pleadings, and no decision was in fact made in regard to them. That suit was determined solely upon the ground that the case made by the plaintiffs was not such as to warrant the Court in making a decree for a sale of the premises upon the reasons and for the causes alleged in that bill, and above stated.

The case is now brought before us upon allegations and denials which directly involve the construction of the devise, and render it necessary to determine the respective rights of the devisees and heirs-at-law to the estate in controversy. In order to decide the questions thus raised it is material to ascertain in the outset the legal nature and quality of the estate which is created by the terms of the devise to Timothy Newell and others, deacons of the church in Brattle Street. If the gift had been solely to the deacons of the church in Brattle Street and their successors forever, without any condition annexed thereto concerning its use and occupation, it would without doubt have vested in them the absolute legal estate in fee. By the provincial statute of 28 G. 2, which was in force at the time of the death of the testatrix, the deacons of all Protestant churches were made bodies corporate, with power to take in succession all grants and donations, both of real and personal estate: Anc. Chart. 605. The words of the devise were apt and sufficient to create a fee in the deacons and their successors, and they were legally competent to take and hold such an estate. It therefore becomes necessary to consider the nature and effect of the condition annexed to the gift; how far it qualifies the fee devised to the deacons and their successors; and what was the interest or estate devised over to John Hancock and his heirs

forever, upon a failure to comply with and perform the condition. It will aid in the solution of these questions if we are able in the first place to determine, with clearness and accuracy, within what class or division of conditional and contingent estates the devise in question falls.

Strictly speaking, and using words in their precise legal import, the devise in question does not create simply an estate on condition. By the common law, a condition annexed to real estate could be reserved only to the grantor or devisor, and his heirs. Upon a breach of the condition the estate of the grantee or devisee was not *ipso facto* terminated, but the law permitted it to continue beyond the time when the contingency upon which it was given or granted happened, and until an entry or claim was made by the grantor or his heirs, or the heirs of the devisor, who alone had the right to take advantage of a breach: 2 Bl. Com. 156; 4 Kent Com. (6th ed.) 122, 127. Hence arose the distinction between a condition and a conditional limitation. A condition, followed by a limitation over to a third person in case the condition be not fulfilled, or there be a breach of it, is termed a conditional limitation. A condition determines an estate after breach, upon entry or claim by the grantor or his heirs, or the heirs of the devisor. A limitation marks the period which determines the estate, without any act on the part of him who has the next expectant interest. Upon the happening of the prescribed contingency, the estate first limited comes at once to an end, and the subsequent estate arises. If it were otherwise, it would be in the power of the heir to defeat the limitation over, by neglecting or refusing to enter for breach of the condition. This distinction was originally introduced in the case of wills, to get rid of the embarrassment arising from the rule of the ancient common law, that an estate could not be limited to a stranger, upon an event which went to abridge or destroy an estate previously limited. A conditional limitation is therefore of a mixed nature, partaking both of a condition and of a limitation; of a condition, because it defeats the estate previously limited; and of a limitation, because, upon the happening of the contingency, the estate passes to the person having the next expectant interest, without entry or claim.

There is a further distinction in the nature of estates on condition, and those created by conditional limitation, which it may

be material to notice. Where an estate in fee is created on condition, the entire interest does not pass out of the grantor by the same instrument or conveyance. All that remains after the gift or grant takes effect continues in the grantor, and goes to his heirs. This is the right of entry, as we have already seen, which, from the nature of the grant, is reserved to the grantor and his heirs only, and which gives them the right to enter as of their old estate, upon the breach of the condition. This possibility of reverter, as it is termed, arises in the grantor or devisor immediately on the creation of the conditional estate. It is otherwise where the estate in fee is limited over to a third person in case of a breach of the condition. Then the entire estate, by the same instrument, passes out of the grantor or devisor. The first estate vests immediately, but the expected interest does not take effect until the happening of the contingency upon which it was limited to arise. But both owe their existence to the same grant or gift; they are created *uno flatu;* and being an ultimate disposition of the entire fee, as well after as before the breach of the condition, there is nothing left in the grantor or devisor or his heirs. The right or possibility of reverter, which, on the creation of an estate in fee on condition merely, would remain in him, is given over by the limitation which is to take effect on the breach of the condition.

One material difference therefore between an estate in fee on condition and on a conditional limitation is briefly this, that the former leaves in the grantor a vested right which, by its very nature, is reserved to him as a present existing interest, transmissible to his heirs; while the latter passes the whole interest of the grantor at once, and creates an estate to arise and vest in a third person, upon a contingency, at a future and uncertain period of time. A grant of a fee on condition only creates an estate of a base or determinable nature in the grantee, leaving the right or possibility of reverter vested in the grantor. Such an interest or right in the grantor, as it does not arise and take effect upon a future uncertain or remote contingency, is not liable to the objection of violating the rule against perpetuities, in the same degree with other conditional and contingent interests in real estate of an executory character. The possibility of reverter, being a vested interest in real property, is capable at all times of being released to the person holding the estate on

condition, or his grantee, and, if so released, vests an absolute and indefeasible title thereto. The grant or devise of a fee on condition does not therefore fetter and tie up estates so as to prevent their alienation, and thus contravene the policy of the law which aims to secure the free and unembarrassed disposition of real property. It is otherwise with gifts or grants of estates in fee, with limitations over upon a condition or event of an uncertain or indeterminate nature. The limitation over being executory and depending on a condition, or an event which may never happen passes no vested interest or estate. It is impossible to ascertain in whom the ultimate right to the estate may vest, or whether it will ever vest at all, and therefore no conveyance or mode of alienation can pass an absolute title, because it is wholly uncertain in whom the estate will vest on the happening of the event or breach of the condition upon which the ulterior gift is to take effect.

Bearing in mind these distinctions, it is obvious that the devise in question was not the gift of an estate on a condition merely, but it also created a limitation over on the happening of the prescribed contingency to a third person and his heirs forever. It was therefore a conditional limitation, under which general head or division may be comprehended every limitation which is to vest an interest in a third person on condition or upon an event which may or may not happen. Such limitations include certain estates in remainder as well as gifts and grants which, when made by will, are termed executory devises, and when contained in conveyances to uses assume the name of springing or shifting uses: 1 Preston on Estates, §§ 40, 41, 93; 4 Kent Com. (6th ed.) 128, note; 2 Fearne Cont. Rem. (10th ed.) 50; 1 Pow. Dev. 192 and note 4; 1 Shep. Touch. 126.

That the devise in question does not create a contingent remainder in John Hancock and his heirs is very clear upon familiar and well-established principles. There is, in the first place, no particular estate upon the natural determination of which the limitation over is to take effect. The essence of a remainder is that it is to arise immediately on the termination of the particular estate by lapse of time or other determinate event, and not in abridgment of it. Thus a devise to A. for twenty years, remainder to B. in fee, is the most simple illustration of a particular estate and a remainder. The limitation over

does not arise and take effect until the expiration of the period of twenty years, when the particular estate comes to an end by its own limitation. So a gift to A. until C. returns from Rome, and then to B. in fee constitutes a valid remainder, because the particular estate, not being a fee, is made to determine upon a fixed and definite event, upon the happening of which it comes to its natural termination. But if a gift be to A. and his heirs till C. returns from Rome, then to B. in fee, the limitation over is not good as a remainder, because the precedent estate, being an estate in fee, is abridged and brought to an abrupt termination by the gift over on the prescribed contingency. One of the tests, therefore, by which to distinguish between estates in remainder and other contingent and conditional interests in real property is that where the event which gives birth to the ulterior limitation, determines and breaks off the preceding estate before its natural termination, or operates to abridge it, the limitation over does not create a remainder, because it does not wait for the regular expiration of the preceding estate: 1 Jarman on Wills, 780; 4 Kent Com. 197. Besides, wherever the gift is of a fee, there cannot be a remainder, although the fee may be a qualified or determinable one. The fee is the whole estate. When once granted, there is nothing left in the donor but a possibility or right of reverter, which does not constitute an actual estate: 4 Kent Com. 10, note; Martin v. Strachan, 5 T. R. 107, note; 1 Jarman on Wills, 792. All the estate vests in the first grantee, notwithstanding the qualification annexed to it. If, therefore, the prior gift or grant be of a fee, there can be neither particular estate nor remainder; there is no particular estate, which is an estate less than a fee; and no remainder, because, the fee being exhausted by the prior gift, there is nothing left of it to constitute a remainder. Until the happening of the contingency, or a breach of the condition by which the precedent estate is determined, it retains all the characteristics and qualities of an estate in fee. Although defeasible, it is still an estate in fee. The prior estate may continue forever, it being an estate of inheritance, and liable only to determine on an event which may never happen. For this reason the rule of the common law was established that a remainder could not be limited after a fee. In the present case the devise was, as we have already stated, a gift to the deacons and their

successors forever; and they being by statute a quasi corporation, empowered to take and hold grants in fee, it vested in them, *ex vi termini,* an estate in fee, qualified and determinable by a failure to comply with the prescribed condition. The limitation over, therefore, to John Hancock and his heirs could not take effect as a remainder.

It necessarily results from these views of the nature and quality of conditional and contingent estates, as applicable to the devise in question, that the limitation of the estate over to John Hancock and his heirs, after the devise in fee to the deacons and their successors, is a conditional limitation, and must take effect, if at all, as an executory devise. The original purpose of executory devises was to carry into effect the will of the testator, and give effect to limitations over, which could not operate as contingent remainders, by the rules of the common law. Indeed, the general and comprehensive definition of an executory devise is a limitation by will of a future estate or interest in land, which cannot, consistently with the rules of law, take effect as a remainder. Every devise to a person in derogation of, or substitution for a preceding estate in fee simple is an executory devise: 4 Kent Com. 264; 1 Jarman on Wills, 778; Lewis on Perp. 72; 6 Cruise Dig. tit. 38, c. 17, §§ 1, 2; Purefoy v. Rogers, 2 Saund. 388 a, and note. Thus a limitation to A. and his heirs, and if he die under the age of twenty-one years, then to B. and his heirs, is an executory devise, because it is a limitation of an estate over after an estate in fee. This, by the rules of the ancient common law, would have been void, for the reason that they did not permit any limitation over after the grant of a previous fee. Whenever, therefore, a devisor disposes of the whole fee in an estate to one person, but qualifies this disposition, by giving the estate over, upon breach of a condition, or happening of a contingency, to some other person, this creates an executory devise: 4 Kent Com. 368; 6 Cruise Dig. tit. 38, c. 17, § 2; Bac. Ab. Devise, I, 1 Fearne Cont. Rem. 399.

In the case at bar the devise is to the deacons and their successors in this office forever. By itself this gave to them an absolute estate in fee simple; but the gift in fee was qualified and abridged by the condition annexed, and by the limitation over to John Hancock and his heirs. From the rules and principles which we have been considering it would seem to be very

clear that the devise in question did not create an estate on condition, because the entire fee passed out of the devisor by the will; no right of entry for breach of the condition was reserved, either directly or by implication, to herself or her heirs, but upon the prescribed contingency it was devised over to a third person in fee. It did not create an estate in remainder because there was no particular estate which was first to be determined by its own limitation before the gift over took effect, and because, the prior gift being of the entire fee, there was no remainder, inasmuch as the prior estate might continue forever. It did create an executory devise, because it was a limitation by will of a fee after a fee, which, by the rules of law, could not take effect as a remainder.

This being the nature of the devise to John Hancock and his heirs, it remains to be considered whether there is anything in the nature of the gift over which renders it invalid, and if so, the effect of its invalidity upon the prior estate devised to the deacons and their successors. Upon the first branch of this inquiry, the only question raised is whether the gift over is not made to take effect upon a contingency which is too remote, as violating the well-established and salutary rule against perpetuities. Executory devises in their nature tend to perpetuities, because they render the estate inalienable during the period allowed for the contingency to happen, though all mankind should join in the conveyance. They cannot be aliened or barred by any mode of conveyance, whether by fine, recovery or otherwise: 4 Kent Com. 266; 2 Saund. 388 a, note. Hence the necessity of fixing some period beyond which such limitations should not be allowed. It has therefore long been the settled rule in England, and adopted as part of the common law of this Commonwealth, that all limitations, by way of executory devise, which may not take effect within the term of a life or lives in being at the death of the testator, and twenty-one years afterward, as a term in gross, or, in case of a child *en ventre sa mere*, twenty-one years and nine months, are void as too remote and tending to create perpetuities: 4 Kent Com. 267; 1 Jarman on Wills, 221; 4 Cruise Dig. tit. 32, c. 24, § 18; Nightingale v. Burrell, 15 Pick. 111; see, also, Cadell v. Palmer, 1 Cl. & Fin. 372, 421, 423, which contains a very full and elaborate history and discussion of the cases on this subject. In the

application of this rule, in order to test the legality of a limitation, it is not sufficient that it be capable of taking effect within the prescribed period; it must be so framed as *ex necessitate* to take effect, if at all, within that time. If, therefore, a limitation is made to depend upon an event which may happen immediately after the death of the testator, but which may not occur until after the lapse of the prescribed period, the limitation is void. The object of the rule is to prevent any limitation which may restrain the alienation of property beyond the precise period within which it must by law take effect. If the event upon which the limitation over is to take effect may, by possibility, not occur within the allowed period, the executory devise is too remote, and cannot take effect: Nightingale v. Burrell, 15 Pick. 111; 4 Kent Com. 283; 6 Cruise Dig. tit. 38, c. 17, § 23. These rules are stated with great precision in 2 Atkinson on Conveyancing (2d ed.) 264.

The devise over to the heirs of John Hancock is therefore void, as being too remote. The event upon which the prior estate was to determine, and the gift over take effect, might or might not occur within the life or lives in being at the death of the testatrix, and twenty-one years thereafter. The minister of the church in Brattle Square, it is true, might have ceased constantly to reside and dwell in the house, and it might have been improved for other purposes, within a year after the decease of the testatrix; but it is also true that it may be occupied as a parsonage, in the manner prescribed in the will, as it has hitherto been during the past seventy-five years, for five hundred or a thousand years to come. The limitation over is not made to take effect on an event which necessarily must happen at any fixed period of time, or even at all. It is not dependent on any act or omission of the devisees, over which they might exercise a control. It is strictly a collateral limitation, to arise at a near or remote period, uncertain and indeterminate, and contingent upon the will of a person who may at any time happen to be clothed with the office of eldest minister of the church in Brattle Square. It is difficult to imagine an event more indefinite as to the time at which it may happen, or more uncertain as to the cause to which it is to owe its birth.

The more common cases of limitations by executory devise, which are held void, as contravening the rule against perpetui-

ties, are when property is given over upon an indefinite failure of issue, or to a class of persons answering a particular description, or specifically named; as to the children of A., who shall attain the age of twenty-five, or to a person possessing a certain qualification, with which he will not be necessarily clothed within the prescribed period. So gifts to take effect upon the extinction of a dignity, by failure of the lives of persons to whom it is descendable: Bacon v. Proctor, Turn. & Russ. 31; Mackworth v. Hinxman, 2 Keen, 658, or depending on the contingency of no heir male or other heir of a particular person attaining twenty-one, no person being named as answering that description: Ker v. Lord Dungannon, 1 Dru. & War. 509; are held invalid, as being too remote. So, too, in a case more analogous to the present, where the testator devised lands to trustees, and directed the yearly rents, to a certain amount then fixed and named in the will, to be appropriated for certain charitable purposes; and provided that in the event of there being a new letting, by which an increase of rents was obtained, the surplus arising from such increase should go to the use and behoof of the person or persons belonging to certain families, who, for the time being, should be lord or lords, lady or ladies, of the manor of Downpatrick; and in case the said families did not protect the charities established by the will, or if the said families should become extinct, then the said surplus rents were to be appropriated to said charities, in addition to the former provisions for the charity; it was held that the gift over of the surplus rents to the trustees for the charity was too remote, as the contingency upon which it was to take effect was not restricted to the proper limits: Commissioners of Charitable Donations v. Baroness De Clifford, 1 Dru. & War. 245, 253. In this case Lord Chancellor Sugden says: "This is a clear equitable devise of a fee qualified or limited; a fee in the surplus rents for his family, so long as they shall be lords and ladies of the manor of Downpatrick, 'in case' (and I must here read the words 'in case' as if they were 'whilst,' or 'so long as'), certain persons protect the almshouse, etc.; and thus the limitation would assume the same character as that which is so familiar to us all, viz.: while such a tree shall stand, or the happening of any other indifferent event. Such being my opinion with respect to the estate devised to these families, I must hold the gift over void. The law admits of no

gift over, dependent on such an estate; a limitation after it is void, and cannot be supported; otherwise it would take effect after the time allowed by law." It is difficult to distinguish that case from the one at bar. The contingency of the families neglecting to protect the charities established by the will, in that case, was no more remote than that of the failure or omission of the minister of the church for the time being to reside and dwell in the house, as is prescribed by the will in the present case. Either event might take place within the prescribed period, but it might not until a long time afterward. It can make no difference in the application of the case cited that it was the gift of an equitable fee simple, because the limits prescribed to the creation of future estates and interest are the same at law and in equity: Lewis on Perp. 169; 4 Cruise Dig. tit. 32, c. 24, § 1; Duke of Norfolk v. Howard, 1 Vern. 164.

But it is quite unnecessary to seek out analogies to sustain this point, as we have a direct and decisive authority in the case of Welsh v. Foster, 12 Mass. 97. It was there held that a limitation, in substance the same as that annexed to the devise in the present case, being made to take effect when the estate should cease to be used for a particular purpose, was void, for the reason that it contravened the rule against perpetuities. That was the case of a grant by deed, with a proviso that the estate was not to vest "until the millpond [on the premises] should cease to be employed for the purpose of carrying any two mill-wheels"; and it was adjudged that the rule was the same as to springing and shifting uses created by deed, as that uniformly applied to executory devises in order to prevent the creation of inalienable estates. The limitation was therefore held invalid, as depending on a contingency too remote.

The true test, by which to ascertain whether a limitation over is void for remoteness, is very simple. It does not depend on the character or nature of the contingency or event upon which it is to take effect. These may be varied to any extent. But it turns on the single question whether the prescribed contingency or event may not arise until after the time allowed by law, within which the gift over must take effect. Applying this test to the present case, it needs no argument or illustration to show that the devise over to John Hancock and his heirs is upon a con-

tingency which might not occur within any prescribed period, and is therefore void, as being too remote.

The remaining inquiry is as to the effect of the invalidity of the devise over, on account of its remoteness, upon the preceding gift in fee to the deacons and their successors forever. Upon this point we understand the rule to be that if a limitation over is void by reason of its remoteness, it places all prior gifts in the same situation as if the devise over had been wholly omitted. Therefore a gift of the fee or the entire interest, subject to an executory limitation which is too remote, takes effect as if it had been originally limited free from any devesting gift. The general principle applicable to such cases is that when a subsequent condition or limitation is void by reason of its being impossible, repugnant, or contrary to law, the estate becomes vested in the first taker, discharged of the condition or limitation over, according to the terms in which it was granted or devised; if for life, then it takes effect as a life estate; if in fee, then as a fee simple absolute: 1 Jarman on Wills, 200, 783; Lewis on Perp. 657; 2 Bl. Com. 156; 4 Kent Com. 130; Co. Lit. 206 a, 206 b, 223 a. The reason on which this rule is said to rest is that when a party has granted or devised an estate he shall not be allowed to fetter or defeat it by annexing thereto impossible, illegal, or repugnant conditions or limitations. Thus it has been often held that when land is devised to A. in fee, and upon the failure of issue of A., then to B. in fee, and the first estate is so limited that it cannot take effect as an estate tail in A., the limitation over to B. is void, as being too remote, because given upon an indefinite failure of issue, and the estate vests absolutely in fee in A., discharged of the limitation over. So it was early held that where a testator devised all his real and personal estate to his wife for life, and after her death to his son and his heirs forever, and in case of the death of the son without any heir, then over to the plaintiff in fee, the devise over to the plaintiff was void, and the son took an absolute estate in fee: Tilbury v. Barbut, 3 Atk. 617; Tyte v. Willis, Cas. temp. Talb. 1; 1 Fearne Cont. Rem. 445. So, too, if a devise be made to A. and his heirs forever, and for want to such heirs to a stranger in fee, the devise over to the stranger would be void for remoteness, and A. would take a fee simple absolute: Nottingham v. Jennings, 1 P. W. 25; 1 Pow. Dev. 178, 179; 2 Saund. 388 a, b; 1 Fearne

Cont. Rem. 467; Attorney General v. Gill, 2 P. W. 369; Busby v. Salter, 2 Preston's Abstracts, 164; Kampf v. Jones, 2 Keen, 756; Ring v. Hardwick, 2 Beav. 352; Miller v. Macomb, 26 Wend. 229; Ferris v. Gibson, 4 Edw. Ch. 707; Tator v. Tator, 4 Barb. 431; Conklin v. Conklin, 3 Sandf. Ch. 64.

Such indeed is the necessary result which follows from the manner in which executory devises came into being and were engrafted on the stock of the common law. Originally, as has been already stated, no estate could be limited over after a limitation in fee simple, and in such case the estate became absolute in the first taker. This rule was afterward relaxed in cases of devises, for the purpose of effectuating the intent of testators, so far as to render such gifts valid by way of executory devise, when confined within the limits prescribed to guard against perpetuities. If a testator violated the rule by a limitation over which was too remote, the result was the same as if at common law he had attempted to create a remainder after an estate in fee. The remainder would have been void, and the fee simple absolute would have vested in the first taker: 6 Cruise Dig. tit. 38, c. 12 § 20; Co. Lit. 18 a, 271 b.

The rule is, therefore, that no estate can be devised to take effect in remainder after an estate in fee simple; but a devise, to vest in derogation of an estate in fee previously devised, may under proper limits be good by way of executory devise. If, after a limitation in fee by will, a disposition is made of an estate to commence on the determination of the estate in fee, the law, except in the case of a devise over to take effect within the prescribed period, presumes the estate first granted will never end, and therefore regards the subsequent disposition as vain and useless: Shep. Touch. (Preston's ed.) 417. It makes no difference in the application of this rule that the condition on which the limitation over is made to depend is not *mala in se*. It is sufficient that it is against public policy. Thus in a recent case, where estates were limited to A. for ninety-nine years, if he should so long live, remainder to the heirs male of his body, with a proviso that if A. did not during his lifetime acquire a certain dignity in the peerage, the gift to his heirs male should be void, and the estate should go over to certain other persons, it was held that this conditional limitation was made to depend upon a condition which was against public policy and therefore

void, and that the estate vested in the eldest son of A. as heir male discharged of the gift over: Egerton v. Earl Brownlow, 4 H. L. Cas. 1. So in the case at bar the limitation over being upon an event which is too remote, and for that reason contrary to the policy of the law, cannot take effect. The estate therefore in the deacons and their successors remains unaffected by the gift over to John Hancock and his heirs. The doctrine on this point is briefly and clearly stated in the Touchstone: "No condition or limitation, be it by act executed, limitation of a use, or by devise or last will, that doth contain in it matter repugnant, or matter that is against law, is good. And therefore, in all such cases, if the condition be subsequent, the estate is absolute and the condition void"; "and the same law is for the most part of limitations, if they be repugnant, or against law, as is of conditions" in like cases: Shep. Touch. 129, 133. See, also, H. L. Cas. 160.

It is undoubtedly true that this construction of the devise defeats the manifest purpose of the testatrix, which was, on a failure to use and occupy the premises as a parsonage in the manner described in the will, to give the estate of John Hancock and his heirs. But no principle is better settled than that the intent of a testator, however clear, must fail of effect if it cannot be carried into effect without a violation of the rules of law: 1 Pow. Dev. 388, 389.

It is to be borne in mind, however, in this connection that the claim set up by the heirs-at-law of the testatrix to the premises in controversy is in direct contravention of the clear intent of the will, by which they are studiously excluded from any share or interest whatever in this estate. All that she did not specifically devise is given by the residuary clause to John Hancock. Her heirs therefore can claim only by virtue of an arbitrary rule of law; and it certainly more accords with the general intent of the testatrix that the absolute title in this estate should, by reason of the invalidity of the gift over, be vested in the deacons and their successors, who were manifestly the chief objects of her bounty in this devise, than in her heirs-at-law, whom she so carefully disinherited. The Court will not construe a conditional limitation as a mere condition, and thus defeat the estate first limited, in a mode not contemplated by the testatrix.

Nor can the estate in question pass by the residuary clause. The testatrix having specifically devised the entire estate to the first taker, and upon the happening of the contingency over, to another person, could not have intended to include it in the gift of the residue. She had given away all her estate and interest in the property, and nothing remained to pass by the residuary clause: 2 Pow. Dev. 102-104; Hayden v. Stoughton, 5 Pick. 538. It is not like a case of a gift on a valid condition, where the right or possibility of reverter remain in the donor or devisor, which would pass under a residuary clause, or in case of intestacy, to the heirs of the donor; but it is the case of a devise in fee on a conditional limitation over, which is void in law. There is, therefore, no possibility or right of reverter left in the devisor, which can pass to heirs or residuary devisees, and the limitation over being illegal and void, the estate remains in the first takers, discharged of the divesting gift. Nor does it make any difference in the application of this well-settled rule of law to the present case that the testatrix in terms declares that the gift to the deacons and their successors shall be void if the prescribed conditions be not fulfilled. The legal effect of all conditional limitations is to make void and terminate the previous estate upon the happening of the designated contingency, and to vest the title in those to whom the estate is limited over by the terms of the gift or grant. The clause in the will, therefore, which declares the gift void in the event of a breach of the condition, and directs that the premises shall revert to her estate, does not change the nature of the estate, nor add any force or effect to the condition which it would not have had at law, if no such clause had been inserted in the will. It is simply a conditional limitation. The condition, being accompanied by a limitation over which is void in law, fails of effect, and the estate becomes absolute in the first takers. It could not revert to her estate because there was no reversion left, the whole estate being limited over by the same devise. Such reversion could only exist in case of a simple condition, as we have already seen; and no such reverter can take place where the condition is accompanied by a limitation over. Besides, and this perhaps is the more satisfactory view of a devise of this nature, the condition operates only as a limitation, the rule being that when an estate is given over upon breach of a condition, and the same is devised by express

words of condition, yet it will be intended as a limitation only. In all cases where a clause in a will operates as a condition to a prior estate, and a limitation over of a new estate, the condition takes effect only as a collateral determination of the prior estate, and not strictly as a condition. Therefore a limitation on a condition or contingency is not a condition; a clause creating contingent remainders or executory gifts by devise is properly a limitation, and though it be in such terms as to defeat another estate by way of shifting use or executory devise, still it is, strictly speaking, a limitation: 2 Cruise Dig. tit. 16, c. 2, § 30; Shep. Touch. 117, 126; Vent. 202; Carter, 171.

The case of Austin v. Cambridgeport Parish, 21 Pick. 215, cited and relied upon by the defendant Hancock, is widely different from the case at bar. That was a grant by deed of an estate, defeasible on a condition subsequent, which was legal and valid. The possibility of reverter was in the grantor and his heirs or devisees; the residue of the estate was vested in his grantee, the parish. The two interests united made up the entire fee-simple estate, and were vested in persons ascertainable and capable of conveying the entire estate. There was nothing, therefore, in that case which resembled a perpetuity, or restrained the alienation of real property. The conditional estate in the parish, and the possibility of reverter in the devisees of the grantor, were vested estates and interests capable of conveyance and constituting together an entire title or estate in fee simple. This is very different from an executory devise, where only the conditional estate is vested, and the persons to whom the limitation over is made are uncertain and incapable of being ascertained until the prescribed contingency happens, however remote that event may be. No conveyance of such an estate, by whomsoever made, could vest a good title, because it can never be made certain until after a breach of the condition, in whom the estate is to vest. Besides, in that case there was nothing illegal or contrary to the policy of the law, in the creation of the estate by the original grantor. The case of Hayden v. Stoughton, 5 Pick. 528, to which reference has also been made, did not raise any question as to the remoteness of the gift over, because it there vested, according to the construction given to the will, within twenty years from the death of the testator, and therefore within the prescribed period. In the case of Brigham v. Shat-

tuck, 10 Pick. 306, the Court expressly avoid any decision on the validity of the devise over, and decide the case upon the ground that the demandant had no title to the premises in controversy.

The result, therefore, to which we have arrived on the whole case is that the gift over to John Hancock is an executory devise, void for remoteness; and that the estate, upon breach of the prescribed condition, would not pass to John Hancock and his heirs by virtue of the residuary clause, nor would it vest in the heirs-at-law of the testatrix. But being an estate in fee in the deacons and their successors, and the gift over being void, as contrary to the policy of the law, by reason of violating the rule against perpetuities, the title became absolute, as a vested remainder in fee, after the decease of the mother of the testatrix, in the deacons and their successors, and they hold it in fee simple, free from the devesting limitation.

A decree may, therefore, be entered for the sale of the estate as prayed for in the bill, and for a reinvestment of the proceeds for the objects and purposes intended to be effected by the trusts declared in the will respecting the property in question.

LEAKE, 112, 113.

(See page 662.)

CHAPTER XXII.

THE RULE AGAINST PERPETUITIES.

CHURCH IN BRATTLE SQUARE v. GRANT.

(See page 682.)

CHAPTER XXIII.

APPLICATION OF THE RULE AGAINST PERPETUITIES.

SMITH v. KIMBALL.

(See page 618.)

CHAPTER XXIV.

THE RULE AGAINST PERPETUITIES APPLIED TO CHARITIES.

CHURCH IN BRATTLE SQUARE v. GRANT.

(See page 682.)

CHAPTER XXVI.

THE RULE AGAINST PERPETUITIES APPLIED TO POWERS.

BROWN ET AL. v. COLUMBIA FINANCE & TRUST CO.

123 Ky. 775, 97 S. W. 421. 1906.

Action by the Columbia Finance & Trust Company against John Mason Brown, Jr., and others. From a judgment for plaintiff, defendants appeal. Reversed.

O'REAR, J. We can do no better in the statement of the case than to adopt the very clear presentation made in the brief of counsel for appellee: This action was brought by the appellee, plaintiff below, to enforce a mortgage given by John Mason Brown upon his interest in the Ellerslie tract of land in Fayette county; and the question presented for decision upon this appeal is whether his interest is one in fee simple, and held by him under the will of his grandmother, Mrs. Preston, and so liable to the mortgage debt, or whether it is an uncertain executory interest, held by him under the will of his mother, Mrs. Mary O. Brown. The Ellerslie tract was owned by Robert Wickliffe, who devised it in trust for the use of his daughter, Mrs. Preston, during her life, giving to her a power to appoint the same by will to the use of any of her children or descendants, and providing that in default of such appointment it should go to her heirs at law. Mrs. Preston, by her will, exercised this power by appointing the property to her six children—five daughters and one son—for their respective lives, with remainder in fee to their children. All of these six children of Mrs. Preston were born before the death of Robert Wickliffe, the creator of the power of appointment, and were therefore in being at the time that power came into existence by his death. One of the six children of Mrs. Preston was Mrs. Mary O. Brown, who died a few years after her mother, leaving a will, by which she devised all of her

property to the Fidelity Trust & Safety Vault Company upon certain trusts for the benefit of her four children, one of whom is John Mason Brown. It is claimed by the appellees that, under the exercise by Mrs. Preston of the power of appointment conferred by Robert Wickliffe's will, John Mason Brown, upon the death of his mother, Mary O. Brown, took an undivided one-fourth interest in fee simple in the one-sixth interest which had been given to Mrs. Brown for life by Mrs. Preston. It is claimed, on the other hand, by Mr. Southgate, the guardian ad litem for the appellants, the children of John Mason Brown, that the exercise by Mrs. Preston of her power of appointment was invalid, and that, therefore, under the will of Robert Wickliffe, the Ellerslie tract passed, in default of any valid appointment, to the children of Mrs. Preston in fee simple upon her death; that Mrs. Brown, as one of these children, had the right to dispose of her interest by will; and that it therefore passed under her will to the trustee therein nominated. It is conceded by all parties that, if Mrs. Brown's one-sixth passed to her solely by the exercise of the power of appointment by her mother, then she had no power to embrace it in the trust created by her will, even if that instrument could be construed as intended to embrace it. The lower court adjudged that John Mason Brown took a vested fee-simple interest under the will of Mrs. Preston, which was liable for the mortgage debt created by him, and ordered it sold to satisfy the claim of plaintiff, Columbia Finance & Trust Company, and from that judgment this appeal is prosecuted by his children, who might have a possible interest in the land, if it were held to have passed under Mrs. Brown's will. John Mason Brown himself, the principal defendant, does not complain of the judgment, nor unite in the appeal.

Robert Wickliffe, the great-grandfather of John Mason Brown, and whose will is first to be construed, provided thus, in the third clause of the second codicil of his will: "I do devise and give to my son-in-law, Wm. Preston, my lands and estates lying near the city of Lexington, between the Richmond and Winchester roads, called Ellerslie and Scuffleton, which estates are composed of the old Ellerslie place derived by me from Mason, the lands adjacent thereto acquired by me through conveyances from my late wife, Mary O. Wickliffe, and a small tract acquired by me from Vaughns, and all of my lands adja-

cent or contiguous to the said tracts amounting altogether to 1,500 or 1,600 acres of land, to have and to hold the said Ellerslie, Scuffleton and other lands to him, the said William Preston, his heirs and assigns in fee forever, but upon these special confidences and trusts, viz.: (1) That he will hold the same for the use and benefit of his wife, my daughter, Margaret Wickliffe Preston, together with rents, issues and profits thereof, for and during the full term and period of her natural life, and after her death, to the use of any child or children or descendants of my said daughter, to whom she may by her last will and testament, or an appointment in the nature of a last will and testament, direct, limit or appoint said uses, and according to the provisions, restrictions and conditions of said will; and if my said daughter should not make any such disposition by will or appointment in the nature of a will, then that the said William Preston shall hold the same for the use and benefit of the heirs at law of my said daughter Margaret. (2) That my said daughter shall not render the said lands liable to debts by mortgaging the same, and shall not charge or incumber said property unless in conformity with the provisions of my will and codicil, and that the said property shall not be sold, conveyed, mortgaged, charged or incumbered, except in conformity with the provisions of my will heretofore declared and specified. (3) Nothing contained in this will and codicil shall be so construed as to discharge the Ellerslie and Scuffleton lands from an estate by the curtesy to William Preston therein, as it is my will that said William Preston shall take an estate by the curtesy in said lands as if the same had passed to my daughter Margaret by descent, and not by this devise."

The said Margaret W. Preston died a resident of Fayette county on February 2, 1898, having theretofore made and published her last will, which was on April 15, 1898, duly probated in Fayette county. Her will recites that it was made in virtue of the power given to her by the will of her father, Robert Wickliffe. She left surviving her six children, and no descendants of any deceased children. She devised the Ellerslie tract of land and all the residue of her real estate to be divided equally among her six children, subject to certain charges against them, respectively, and further provided as follows: "The real estate given by this will to my children is given for and during their

respective lives, and at the death of each shall pass to the heirs of his or her body living at such death, and in the event of there being no such heirs, then to pass to my descendants; but each of the devisees shall have full power, by last will, to devise and dispose of the estate received under this will among such devisees' own descendants, or, if there are none, then among my descendants at such devisees' discretion."

One of the six children of Mrs. Preston was Mary O. Brown, the mother of John Mason Brown. She died a resident of Jefferson county in March, 1898, having theretofore, on January 8, 1895, made and published her will, which was duly probated in Jefferson county. Mrs. Mary O. Brown left surviving her four children; John Mason Brown being one of the number. After certain specific legacies she devised to the Fidelity Trust & Safety Vault Company of Louisville all of her property and estate upon the following trust: "The same shall be held by it, as trustee, and the net income thereof to the extent of $1,500 (fifteen hundred dollars) per annum shall be paid to each of my daughters, if it produces that much income; and after paying $1,500 to each daughter, then the residue of the net income to the amount of $500 each, shall be paid to each of my sons per annum; if the net income is more than sufficient for these purposes the surplus to be equally divided among all my living children. If one of my daughters shall marry she is thereafter to receive only one-fourth of the entire net income of my estate per annum, and my other daughter so long as she shall remain unmarried shall receive of the residue of the net income of my estate $2,000 (two thousand) per annum, if there be enough of my net income to pay it; and of the residue of the net income, after paying the $2,000 to my unmarried daughter, the sum of $500 shall be paid to my sons, if the net income is sufficient, and if there be a surplus beyond that it shall be equally divided and on the marriage of both daughters, I want each among my children to share alike. This trust shall continue as to each child during his or her life. Upon the death of the first of my children who die, one-fourth of the principal of my estate, shall be paid to his or her issue. If there be no issue, then the entire estate shall remain in trust. Upon the death of the second child a one-third portion of the principal of the trust property as then existing shall be paid to his or her children, or issue, if

any; if no issue to remain in trust. Upon the death of a third child a one-half portion of the remaining trust property, as then existing, shall be paid to his or her children or issue, if any, if no children or issue then it shall remain in the trust. I desire my fourth and last surviving child to make whatever disposition they choose of my property."

The question for decision, therefore, is, what estate has John Mason Brown in the property devised? Is it controlled by his mother's will, or does he take as purchaser under the will of his great-grandfather? Section 2360, Ky. St. 1903, reads: "The absolute power of alienation shall not be suspended, by any limitation or condition whatever, for a longer period than during the continuance of a life or lives in being at the creation of the estate, and twenty-one years and ten months thereafter." Under this statute, and under the rule against the creation of perpetuities, the validity of any future estate depends upon the certainty of its vesting within the prescribed period, and this certainty must exist at the time of the creation of the estate. It follows that the estate will be void when this certainty does not exist at the time of its creation, although subsequent events so happen that the estate could vest after that period. It is immaterial whether Mrs. Preston had children born after her father's death. The fact remains that at his death, Mrs. Preston being alive, it was possible that she might have had children born alive thereafter who could have survived her, and who would have taken as members of the class represented by her children. Such after-born child would, therefore, have been one of the persons included in Wickliffe's devise. His daughter had the power of appointment only as among her children, failing which her children, or, as the will says, "her heirs at law," would take as remaindermen under the will of Wickliffe.

To uphold the construction of the will contended for by appellee, and given to it by the circuit court, would be to hold an estate could be created by a will, taking effect at the death of the testator in behalf of one not then in existence for his life, then to his children for life, with remainder to the latter's children. The power of appointment given to the daughter by Robert Wickliffe could not be used to extend the estate created by his will, or to postpone the vesting of the fee for a longer period than Wickliffe himself could have done. The effect of an execu-

tion of a power of appointment is to make such act that of the original testator in effect. To hold it valid would be to say that the testator, though restricted by the statute in the capacity to create an estate beyond a life or lives in being and 21 years and 10 months thereafter, could, by a power of appointment, vest in some other person the ability to further extend the limitation, so as to defeat the purpose of the statute against perpetuities. This we hold would be invalid. We conclude that the will of Mrs. Preston was valid only to the extent that it exercised the appointment allowed by her father's will; that is, in designating which of her children took and in what portions after her own death. But the attempted limitation of their estate to a life estate, with remainder to their children, was void. Hence Mrs. Mary O. Brown took the fee to the property devised to her. She was competent, then, to devise same in her own right. The estate created by her will in her son John Mason Brown is not such as that the title to the land could be disposed of by him by way of mortgage.

The judgment of the circuit court is reversed, and cause remanded for proceedings not inconsistent herewith.

CHAPTER XXVIII.

CO-TENANCY IN GENERAL.

Estates by Entirety Distinguished From Joint Tenancies.

THORNBURG v. WIGGINS.

135 Ind. 178, 34 N. E. 999. 1893.

DAILEY, J. This was an action instituted in the court below, in two paragraphs, in the first of which appellees allege, in substance, that on and before December 15, 1884, one Lemuel Wiggins was the owner of a certain tract of real estate therein described, containing eighty acres; that on said day said Lemuel and his wife, Mary, executed and delivered to the appellees a warranty deed, conveying to them the fee simple of said real estate; that at the time of said conveyance the appellees were, ever since have been, and now are, husband and wife; that said deed conveyed to the appellees the title to said real estate which they took and accepted, ever since have held, and now hold by entireties and not otherwise; that appellees hold their title to said real estate by said deed of Lemuel Wiggins, and not otherwise; that on the 24th "day of April, 1877, Isaac R. Howard and Isaac N. Gaston, who were defendants below, recovered a judgment in the Randolph circuit court for the sum of $403.70 and costs, against one John T. Burroughs and the appellee, Daniel S. Wiggins, as partners, doing business under the firm name of Burroughs & Wiggins; that on May 12, 1886, said Howard and Gaston caused an execution to be issued on said judgment and placed in the hands of the appellant, Thornburg, as sheriff of said county, and directed him to levy the same on said real estate, and that said sheriff did, on the 25th day of May, 1886, levy said execution on said real estate, or on the one-half interest in value thereof, taken as property of said appellant, Daniel S. Wiggins, to satisfy said writ; that pursuant to the levy thereof said sheriff proceeded by the direction of said

Howard and Gaston to advertise said real estate for sale under said execution and levy to make said debt, and did, on the 8th day of June, advertise the same for sale on the 3d day of July, 1886, and will, on said day, sell the same, unless restrained and enjoined from so doing by the court; that said Daniel S. Wiggins has no interest in said premises, subject to sale thereon; that the appellees hold the title thereto as tenants by entireties, and not otherwise; that the sale of said tract on said execution would cast a cloud on the appellees' title," etc.

The second paragraph is the same as the first, in substantial averments, except that in this paragraph the appellees set out as a part thereof a copy of the deed under which they claim title to said real estate as such tenants by entireties.

The granting clause of the deed is as follows: "This indenture witnesseth, that Lemuel Wiggins and Mary Wiggins, his wife, of Randolph County, in the State of Indiana, convey and warrant to Daniel S. Wiggins and Laura Belle Wiggins, his wife, in joint tenancy," etc.

Appellants separately and severally demurred to each paragraph of the complaint, and their demurrers were overruled by the court, to which the appellants excepted, and refusing to answer the complaint, judgment was rendered in favor of appellees on said demurrers.

Appellants appeal, assigning as errors the overruling of said demurrers, and urge that the appellees under the deed took as joint tenants, and hence that the husband's interest is subject to levy and sale upon execution. A joint tenancy is an estate held by two or more persons jointly, so that during the lives of all they are equally entitled to the enjoyment of the land, or its equivalent in rents and profits, but, upon the death of one his share vests in the survivor or survivors until there be but one survivor, when the estate becomes one in severalty in him and descends to his heirs upon his death. It must always arise by purchase, and cannot be created by descent. Such estates may be created in fee, for life, for years, or even in remainder. But the estate held by each tenant must be alike. Joint tenancy may be destroyed by anything which destroys the unity of title. Our law aims to prevent their creation and they cannot arise, except by the instrument providing for such tenancy. Griffin v. Lynch, 16 Ind. 396.

The 9th Am. and Eng. Ency. of Law, 850, says: "Husband and wife are, at common law, one person, so that when realty or personalty vests in them both equally * * * they take as one person, they take but one estate as a corporation would take. In the case of realty, they are seised not per my et per tout, as joint tenants are, but simply per tout; both are seised of the whole, and each being seised of the entirety, they are called tenants by the entirety, and the estate is an estate by entireties. * * * Estates by entireties may be created by will, by instrument of gift or purchase, and even by inheritance. Each tenant is seised of the whole, the estate is inseparable—cannot be partioned; neither husband nor wife can alone affect the inheritance, the survivor's right to the whole."

This tenancy has been spoken of as "that peculiar estate which arises upon the conveyance of lands to two persons who are, at the time, husband and wife, commonly called estates by entirety." As to the general features of estates by entireties there is little room for controversy, and there is none between counsel. Our statute re-enacts the common law. Arnold v. Arnold, 30 Ind. 305; David v. Clark, 26 Ind. 424.

Strictly speaking, estates by entireties are not joint tenancies. Chandler v. Cheney, 37 Ind. 391; Hulett v. Inlow, 57 Ind. 412. The husband and wife being seised not of moieties, but both seised of the entirety per tout and not per my. Jones v. Chandler, 40 Ind. 588; Davis v. Clark, supra; Arnold v. Arnold, supra.

It has been said by this court in some of the earlier decisions that no particular words are necessary. A conveyance which would make two persons joint tenants will make a husband and wife tenants by the entirety. It is not even necessary that they be described as such or their marital relation referred to. Morrison v. Seybold, 92 Ind. 298; Hadlock v. Gray, 104 Ind. 596; Dodge v. Kinzy, 101 Ind. 102; Hulett v. Inlow, supra; Chandler v. Cheney, supra.

But the court has said that the general rule may be defeated by the expression of conditions, limitations, and stipulations, in the conveyance, which clearly indicate the creation of a different estate. Hadlock v. Gray, supra; Edwards v. Beall, 75 Ind. 401.

Having its origin in the fiction of common-law unity of husband and wife, the courts of some States have held that mar-

ried women's acts, extending their rights, destroyed estates by entirety, but this court holds otherwise. Carver v. Smith, 90 Ind. 222.

And the greater weight of authority is in its favor. Our decisions hold that neither, alone, can alienate such estate. Jones v. Chandler, supra; Morrison v. Seybold, supra.

There can be no partition. Chandler v. Cheney, supra.

A mortgage executed by the husband alone is void. Jones v. Chandler, supra.

And the same is true of a mortgage executed by both to secure a debt of the husband. Dodge v. Kinzy, supra.

And the wife cannot validate it by agreement with the purchaser to indemnify in case of loss arising on account of it. State ex rel. v. Kennett, 114 Ind. 160.

A judgment against one of them is no lien upon it. Barren Creek Ditching Co. v. Beck, 99 Ind. 247; McConnell v. Martin, 52 Ind. 434; Othwein v. Thomas, 13 N. E. Rep. 564.

Upon the death of one, the survivor takes the whole in fee. Arnold v. Arnold, supra.

The deceased leaves no estate to pay debts. Simpson v. Pearson, Admr., 31 Ind. 1.

And, during their joint lives, there can be no sale of any part on execution against either. Carver v. Smith, supra; Dodge v. Kinzy, supra; Hulett v. Inlow, supra; Chandler v. Cheney, supra; Davis v. Clark, supra; McConnell v. Martin, supra; Cox's Admr. v. Wood, 20 Ind. 54.

The statutes extending the rights of married women have no effect whatever upon estates by entirety. Carver v. Smith, supra.

Such estate is, in no sense, either the husband's or the wife's separate property. The husband may make a valid conveyance of his interest to his wife, because it is with her consent. Enyeart v. Kepler, 118 Ind. 34.

The rule that husband and wife take by entireties was enacted in this territory in 1807, nine years before Indiana was vested with Statehood, and has been repeated in each succeeding revision of our statutes. It has thus been the law of real property, with us, for eighty-six years.

Section 2922, R. S. 1882, provides that "All conveyances and devises of lands, or of any interest therein, made to two or more

persons, except as provided in the next following section, shall be construed to create estates in common, and not in joint tenancy, unless it shall be expressed therein that the grantees or devisees shall hold the same in joint tenancy and to the survivor of them, or it shall manifestly appear, from the tenor of the instrument, that it was intended to create an estate in joint tenancy."

Section 2923 provides that the preceding section shall not apply to conveyances made to husband and wife.

Under a statute of the State of Michigan, similar in all its essential qualities to our own, the court held that "Where lands are conveyed, in fee to husband and wife, they do not take as tenants in common." Fisher v. Provin, 25 Mich. 347.

They take by entireties; whatever would defeat the title of one would defeat the title of the other. Manwaring v. Powell, 40 Mich. 371.

They hold neither as tenants in common nor as ordinary joint tenants. The survivor takes the whole. During the lives of both, neither has an absolute inheritance interest, neither can be said to own an undivided half. Aetna Ins. Co. v. Resh, 40 Mich. 241; Allen v. Allen, 47 Mich. 74.

While the rule of entireties was predicated upon a fiction, the legislative intent, in this State, has always been to preserve this estate, and has continued the peculiar statute for this purpose. Estates by entireties have been preserved as between husband and wife, although joint tenancies between unmarried persons have been abolished, so as to provide a mode by which a safe and suitable provision could be made for married women. Carver v. Smith, supra.

"Where a rule of property has existed for seventy years and is sustained by a strong and unform line of judicial decisions, there is but little room for the court to exercise its judgment on the reasons on which the rule was founded. Such a rule of property will be overruled only for the most cogent reasons and upon the strongest convictions of its incorrectness. It is evident that the legislature of 1881 did not intend to repeal the statutes establishing tenancies by entireties. They simply intended to enlarge, in some particulars, the separate power of the wife, which existed already under the acts of 1852 and the year following. * * * 'It did not abolish estates by entireties as

between husband and wife, but provided that when a joint deed was made to husband and wife, they should hold by entireties, and not as joint tenants or tenants in common.'" Carver v. Smith, supra.

In Chandler v. Cheney, supra, the court says: "It was a well-settled rule at common law, that the same form of words, which, if the grantees were unmarried, would have constituted them joint tenants, will, they being husband and wife, make them tenants by entirety. The rule has been changed by our statute above quoted."

The whole trend of authorities, however, is in the direction of preserving such tenancies, where the grantees sustain the relation of husband and wife, unless from the language employed in the deed it is manifest that a different purpose was intended.

Where a contrary intention is clearly expressed in the deed, a different rule obtains.

"A husband and wife may take real estate as joint tenants or tenants in common, if the instrument creating the title use apt words for the purpose." 1 Preston on Estates, 132; 2 Blackstone's Com., Sherwood's note; 4 Kent's Com., side page 363; 1 Bishop on Married Women; Freeman on Co-Tenancy, § 72; Fladung v. Rose, 58 Md. 13 (24).

"And in case of devise and conveyances to husband and wife together, though it has been said that they can take only as tenants by entireties, the prevailing rule is that, if the instrument expressly so provides, they may take as joint tenants or tenants in common." Stewart on Husband and Wife, §§ 307-310; Tiedeman on Real Property, § 244.

"And as by common law it was competent to make husband and wife tenants in common by proper words in the deed or devise," etc. Hoffman v. Stigers, 28 Ia. 310; Brown v. Brown, 32 N. E. Rep. 1128.

"So it seems that husband and wife may, by express words, be made tenants in common by gift to them during coverture." McDermott v. French, 15 N. J. Eq. 80.

In Haddock v. Gray, 104 Ind. 596 (599), a conveyance had been made to Isaac Cannon and Mary Cannon, who were husband and wife, during their natural lives, and the court says: "The language employed in the deed under examination plainly declares that Isaac and Mary Cannon are not to take as tenants

by entirety. This result would follow from the provision destroying the survivorship, for this is the grand and essential characteristic of such a tenancy. * * * The whole force of the language employed is opposed to the theory that the deed creates an estate in fee in the husband and wife."

The court further says: "It is true that where real property is conveyed to husband and wife jointly and there are no limiting words in the deed, they will take the estate as tenants in entirety. * * * But while the general rule is as we have stated it, there may be conditions, limitations, and stipulations in the deed conveying the property, which will defeat the operation of the rule. The denial of this proposition involves the affirmation of the proposition that a grantor is powerless to limit or define the estate which he grants, and this would conflict with the fundamental principle that a grantor may for himself, determine what estate he will grant. To deny this right would be to deny to parties the right to make their own contracts. It seems quite clear, upon principle, that a grantor and his grantees may limit and define the estate granted by the one and accepted by the other, although the grantees be husband and wife."

The court then adopts the language of Washburn, supra, and Tiedeman, supra.

In Edwards v. Beall, supra, the court held that when lands are granted husband and wife, as tenants in common, they will hold by moieties, as other distinct and individual persons would do.

If, as contended by appellees, the rule prevail that the same words which, if the grantees were unmarried, would have constituted them joint tenants, will, they being husband and wife, make them tenants by entireties, then it would result as a logical conclusion that husband and wife cannot be joint tenants. Because, by this rule, words, however apt or appropriate to create a joint tenancy, would, in a conveyance to husband and wife, result in an estate by entireties—joint tenancy would be superseded or put in abeyance by the estate created by law-tenancy by entirety.

The result of such reasoning would be to destroy the contractual power of the parties where this relationship between the grantees is shown to exist. Any other process of reasoning would carry the rule too far, and we must hold it modified to

the extent here indicated. Husband and wife, notwithstanding tenancies by entirety exist as they did under the common law, may take and hold lands for life, in joint tenancy, or in common, if appropriate language be expressed in the deed or will creating it, and we know of no more apt terms to create a joint tenancy in the grantees in this estate than the expression "convey and warrant to Daniel S. Wiggins and Laura Belle Wiggins in joint tenancy."

These words appear in the granting clause of the deed conveying the land in question, and the estate accepted and held by the grantees is thereby limited, and they hold not by entireties but in joint tenancy. A joint tenant's interest in property is subject to execution. Freeman on Ex. 125.

Judgment reversed, with instructions to the circuit court to sustain the demurrer to each paragraph of the complaint.

CHAPTER XXIX.

TENANCY IN COMMON.

What Is Meant by Tenants in Common.

CARVER v. FENNIMORE.

116 Ind. 236. 1888.

MITCHELL, J. Complaint by Esther J. Carver against Joseph Fennimore, in which the plaintiff alleged that the defendant was indebted to her in a specified sum for the one-third of the profit, use, and occupation of a certain lot or tract of land in the town of Alexandria, in Madison County.

Issues were made which were tried by a jury, who returned a verdict for the defendant.

The questions for decision will be understood by the following statement of facts: In 1857 Ira K. Carver, the plaintiff's husband, was the owner of eighty acres of land adjoining the town of Alexandria, which he conveyed by a deed of general warranty to his brother, William Carver. The plaintiff's name was signed to the deed without her knowledge or consent, and she remained in ignorance of the conveyance until after the death of her husband, which occurred in April, 1875. She then learned of the conveyance, and that her signature appeared on the deed, whereupon, on the 26th day of February, 1876, she instituted suit in the Madison Circuit Court against William Carver and about twenty others, who claimed different parcels of the land as grantees under him, to set aside the deed, for possession, and to have the title to the land quieted in her. This suit was pending in the Circuit Court until April, 1879, when the plaintiff recovered a judgment and decree against all the defendants in that suit, establishing and quieting her title to, and right to the immediate possession of, the undivided one-third of all the lands so conveyed, and for $125 damages against William Carver.

An appeal was taken to this Court, where the judgment was

afterward affirmed on the 16th day of October, 1884: Carver v. Carver, 97 Ind. 497.

William Perry owned the lot, for the use and occupation of which the plaintiff seeks to recover in the present action, at the time the suit above mentioned was commenced, and he was duly summoned as a party thereto. Pending the suit Perry conveyed by warranty deed to Mrs. Fadely, who made valuable improvements on the lot, and who, subsequently, in April, 1880, while the appeal was pending in this Court, conveyed to the appellee, Fennimore. At the time the suit for possession was commenced the lot was unimproved, and the value of the use was merely nominal.

The question now is whether or not Fennimore is liable for the use and occupation of the land, and if he is, whether or not the rental value is to be estimated according to the condition of the land prior and without reference to the improvements placed thereon by his grantor pending to the suit, or whether he must account for the value of the use of the land with the improvements?

On behalf of the appellant it is contended that the only defense the appellee was legally entitled to make was as to the rental value of the property as it was when he had possession of it; that the judgment and decree in the former suit determined all questions as to the value of the improvements upon the real estate.

It may be conceded that the former judgment and decree settled conclusively all questions concerning the ownership of the land, and of the title to the improvements which had become a part of the freehold, whether such improvements existed thereon when the action was commenced or were made pending the litigation. This concession, however, does not dispose of nor materially affect the questions for decision in the present case.

The effect of the decree in the former suit was to declare and conclusively establish the fact that the appellant was the owner of an undivided one-third of the property in dispute, and that she was entitled to occupy the legal relation of tenant in common with those who claimed title to the lot under the deed of her deceased husband. That question is no longer open to debate, but the rights and obligations of the co-tenants, as such,

in respect to the improvement or enjoyment of the common estate, had not been adjudicated.

The relation of tenant in common arises "where two or more persons are entitled to land in such a manner that they have an undivided possession, but several freeholds, i. e., no one of them is entitled to the exclusive possession of any particular part of the land, each being entitled to occupy the whole in common with the others, or to receive his share of the rents and profits: Rapalje & Lawrence Law Dict., tit. "Tenancy in Common."

That one tenant may exclude the other from or deny his title to the common estates does not destroy the legal relation or the respective rights and remedies of co-tenants, if they be in fact owners in common, nor does a decree establishing and quieting the title of the excluded tenant necessarily determine the rights of the parties as regards an equitable accounting in an appropriate proceeding in respect to use and occupation, nor in respect to improvements made in good faith by the occupying tenant: Carver v. Coffman, 109 Ind. 547.

The decree conclusively establishes the fact of common ownership in the property, but it does not necessarily settle the equities between the parties growing out of the occupancy or improvement of the common estate.

Notwithstanding the statute, § 288, R. S. 1881, which declares in effect that a tenant in common may maintain an action against his co-tenant for receiving more than his share or just proportion, the settled rule is that a co-tenant can only be compelled to account in case he has actually received rents from a third person, or when he has entered upon and held exclusive possession of the whole estate in hostility to and to the exclusion of his co-tenant: Humphries v. Davis, 100 Ind. 369, and cases cited; Carver v. Coffman, supra, and cases cited; Osborn v. Osborn, 62 Texas, 495; Edsall v. Merrill, 37 N. J. Eq. 114; Early v. Friend, 16 Gratt. 21 (78 Am. Dec. 649, and note); Kean v. Connelly, 25 Minn. 222 (33 Am. Rep. 458).

It appears that the appellee and his grantors occupied the whole estate, denied the right of the appellant and contested her claim to an interest in the common property. She is, therefore, entitled, within the rule above declared, to an accounting for her just proportion of the use and occupation of the lot in

controversy: Freeman Co-Tenancy and Par., §§ 275, 277. The instructions of the Court relevant to the features of the case above considered were substantially in consonance with the foregoing conclusions.

In refusing an instruction asked by the appellant and in the admission of evidence, the Court proceeded upon the theory that the liability of the defendant was to be determined upon the basis of the rental value of the property in the condition it was prior to the making of the improvements thereon by the occupying claimants. This, the appellant contends, was an erroneous theory. The action by one co-tenant against another for an accounting for rents is a liberal and equitable action, and equitable defenses may be made, and in such a case, if the excluded tenant receives actual compensation for the damages sustained, he has no just ground of complaint. Unless, therefore, some peculiar circumstances are shown, the owner of an undivided interest in land who occupies the whole estate in good faith, under claim and color of title to the whole, and has made permanent and valuable improvements under the mistaken belief that he is the owner of the whole estate, is accountable only for the fair rental value of the property in the condition in which it was when it went into his possession.

The excluded owner or tenant is not, under ordinary circumstances, entitled to the enhanced rental value resulting from the improvements made with the capital of the bona fide occupant, or by his grantor from whom he purchased: Morrison v. Robinson, 31 Pa. St. 456; Pickering v. Pickering, 63 N. H. 468.

This rule is in analogy to that prescribed by the statute governing the rights and liabilities of occupying claimants, and has, besides, the support of reason and authority: White v. Stuart, 76 Va. 546, 567; Early v. Friend, supra.

The defendant, and his grantor, who made the improvements, went into possession of the whole lot under a duly acknowledged and recorded deed, to which the plaintiff's name as well as that of her husband appeared to have been signed. It turned out that the plaintiff's signature thereto was without authority, and the persons in possession were the owners of only an undivided two-thirds of the property after the death of the husband. It could hardly have been expected that they would surrender the whole lot upon the institution of the suit by the plaintiff,

notwithstanding the deed from Ira K. Carver and wife, which appeared to have been made in 1857, nor were they bound to have the property lie idle, unproductive and unimproved, or take the chance of paying an enhanced value for the improvements which resulted from their own enterprise: Ford v. Knapp, 102 N. Y. 135, 55 Am. Rep. 782.

This results in no injustice to the plaintiff, while to adopt the measure of damages contended for would be inequitable and injurious to the defendant.

While a tenant in common who disseizes his co-tenant and makes improvements on the common estate may not be entitled to compensation for improvements so made, he is, nevertheless, entitled to have them considered when called to account in an equitable action for rents and profits.

There are no circumstances disclosed in the present case which equitably entitle the appellant to the rental value of the land with the improvements. What the rights of the parties may be in respect to the improvements in any other proceeding than the present is not here considered nor determined. These considerations lead to an affirmance of the judgment.

Judgment affirmed, with costs.

CHAPTER XXXI.

COPARCENARY.

LITTLETON.

§§ 241, 242, 265, 277, 280-282, 287, 292, 294, 309, 319, 321.

Parceners are of two sorts, to wit; parceners according to the course of the common law, and parceners according to the custom. Parceners after the course of the common law are, (where a man, or woman, seised of certain lands or tenements in fee simple or in tail, hath no issue but daughters, and dieth, and the tenements descend to the issues, and the daughters enter into the lands or tenements so descended to them, then they are called parceners, and be but one heir to their ancestor). And they are called parceners; because by the writ, which is called *breve de participatione facienda,* the law will constrain them, that partition shall be made among them. And if there be two daughters to whom the land descendeth, then they be called two parceners; and if there be three daughters, they be called three parceners; and four daughters, four parceners; &c.

Also, if a man seised of tenements in fee simple or in fee tail dieth without issue of his body begotten, and the tenements descend to his sisters, they are parceners, as is aforesaid. And in the same manner, where he hath no sisters, but the lands descend to his aunts, they are parceners, &c. But if a man hath but one daughter, she shall not be called parcener, &c.

Parceners by the custom are, where a man seised in fee simple, or in fee tail of lands or tenements which are of the tenure called gavelkind within the county of Kent, and hath issue divers sons and die, such lands or tenements shall descend to all the sons by the custom, and they shall equally inherit and make partition by the custom, as females shall do, and a writ of partition lieth in this case as between females. But it behooveth in the declaration to make mention of the custom. Also such custom is in other places of England, &c.

CHAPTER XXXII.

ESTATES ARISING BY MARRIAGE IN GENERAL.

THORNBURG V. WIGGINS.

(See page 705.)

Community Property.

DOUGLAS v. DOUGLAS ET AL.

22 Idaho 336, 125 Pac. 796. 1912.

Action by Thomas J. Douglas against Mary E. Douglas and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

AILSHIE, J. On about the 12th day of May, 1897, the appellant, Thomas J. Douglas, was a resident of Otero county, Colo., and there intermarried with Margaret V. Douglas, and thereafter the two continued to live together as husband and wife in the state of Colorado until the 25th day of February, 1908, on which date they removed from Colorado to Idaho. Between the date of their marriage and their removal to Idaho and while they were husband and wife they acquired and accumulated real, personal, and mixed property which amounted to the sum of $13,050 at the time of their departure for Idaho. During this time they were engaged in the farming business; the wife discharging the usual and ordinary household duties, and the husband conducting the farming business. The wife had no separate property of any kind or character recognized as such under the laws of Colorado. Upon arriving at Twin Falls, Idaho, the husband invested this money in real estate. They continued to live in Idaho until the time of the death of Margaret V. Douglas, the wife of appellant, which occurred on the 25th day of October, 1909. She left surviving her her husband and her minor children, Mary E. Douglas, Robert M. Douglas, and Kenneth Douglas. Administration was had on

the estate of Margaret V. Douglas, and, among other things, the inventory returned one-half of this real estate as community property and subject to administration under the laws of Idaho. The administration proceeded on the theory that this was community property, and an order was subsequently made for the sale of this property, and a sale was made. Thereafter the husband, Thomas J. Douglas, concluded that this was not community property but his separate property, and he was thereupon suspended as administrator of the estate, and a special administrator was appointed, and appellant thereupon made a motion to have this property stricken from the inventory on the ground that it was not community property, but his separate property. This motion was sustained by the probate court. Thereafter the appellant instituted this action for the purpose of quieting his title to the whole of the property on the ground that it was his separate estate.

We are called upon in this case to determine whether the property purchased by the appellant on his arrival here from Colorado became his separate property or the community property of himself and wife. Under the provisions of section 2679, Rev. Codes, "all property owned by the husband before marriage, and that acquired by gift, bequest, devise or descent is his separate property"; and section 2680 defines the status of all property acquired after marriage by either husband or wife, and section 3060 defines community property as follows: "Community property is property acquired by husband and wife, or either, during marriage, when not acquired as the separate property of either."

It will be observed from the foregoing provisions of the statute that the community property law prevails in this state, and it will therefore afford us very little light or information to examine or review authorities coming from states where the common-law rule prevails with reference to the property relations between husband and wife. It seems to be conceded by counsel on both sides of this case that the community property law does not prevail in Colorado and did not prevail at the time that appellant and his wife acquired this property and departed from the state. Upon the trial of the case the appellant offered to introduce a part of the dissenting opinion in Schuler v. Henry, a Colorado case reported in 42 Colo. 367, 94 Pac. 360,

14 L. R. A. (N. S.) 1009, which quotes with approval from D. & R. G. R. Co. v. Young, 30 Colo. 349, 70 Pac. 688, to the effect that the wife acquires no right or interest in any property accumulated by her labor and services in the performance of the usual and ordinary household duties, and that such services belong to the husband. We shall not go into this question, however, because it is conceded that the property accumulated in Colorado by appellant and his wife was the separate property of the appellant there.

Various principles of law are discussed by respective counsel pro and con as bearing upon this question. It is urged, for instance, that the marital relation in Colorado amounted to a contract, and that this property was acquired under that contract, and that to allow the wife an interest in the property in this state would be a violation of the contract entered into in another state. On the other hand, it is contended that under the law of Idaho the accumulations of the husband and wife after marriage are community property in which the two spouses are equally interested, and that to inquire into the laws of Colorado which vest the absolute title in the husband and enforce such law in Idaho is contrary to all legal principles, in that it amounts to executing a foreign law within our own jurisdiction. It is not perceived that either of these contentions is well founded in this case for reasons which we will hereafter give. It is a well established rule that personal property acquired during coverture is governed and controlled by the law of the marital domicile. This seems to be based upon the theory that movables have no situs, or rather that they accompany the person everywhere. Kraemer v. Kraemer, 52 Cal. 305; note to Rush v. Landers, 57 L. R. A. 353; note to Brookman v. Durkee, 12 L. R. A. (N. S.) 921. On the other hand, real property is governed by the law of its situs. Rush v. Landers, 107 La. 549, 32 South. 95, 57 L. R. A. 353, and note.

Then we have this situation: That real property is purchased in this state by a married man and during the existence and continuance of the marital relation. The prima facie presumption at once arises under our statute that this property was community property. The man who purchased it, however, and on whom the burden of showing that it is not community property rests, resists and contests the claim that

such property is community property, and in doing so shows that it was purchased wholly with personal property which was at the time his separate and individual estate.

In doing so, he finds it necessary to prove the laws of the state in which he accumulated this personal property and from which he brought it in order to show that it was his separate and individual estate and that his wife, the other member of the community, had no interest in such property.

It is not, therefore, a question of enforcing and executing a foreign law in this state, but it is merely a question of ascertaining what the foreign law was as one of the probative facts in establishing the ownership of the property.

We start into the investigation in Idaho confronted with the statute which says that all property acquired by husband and wife, or either, during marriage, when not acquired as separate property of either, is community property, and the presumption, in the first instance, is that the laws of Colorado are the same as the laws of this state. Maloney v. Winston Bros. Co., 18 Idaho 757, 111 Pac. 1086. This presumption, however, is subject to be rebutted by competent proof. The appellant succeeds in this proof by showing that there was no community property law in Colorado when he accumulated this property, and that such accumulations were the sole and separate property of the husband under those laws. By this means, the title and ownership to this property is fully and clearly established, and we find that, when appellant departed from the state of Colorado with this property, it was his separate property, and of course the mere crossing the state line into Idaho could not divest him of his title or vest that title in some one else. It would take something more than the mere crossing of the state line to transfer the title to property he had with him. He shows then that he immediately invested that money in this particular real estate in Idaho. The mere fact of investing this money could not of itself change the title or transfer the right of property from him to some one else. This is merely an exchange of one class of property for another, and it is well settled that investing one kind or class or species of property in another kind or class does not change the character of the title or right of ownership, and that the title by which the property was held and governed will continue the

same. Thayer v. Clarke (Tex. Civ. App.) 77 S. W. 1050. Such property, therefore, as the real estate here involved purchased in the manner this was purchased, with the separate property of the husband, does not fall within the class of "property acquired after marriage" referred to and defined in § 2680, supra.

This question has been considered by a number of courts where the community law prevails. Kraemer v. Kraemer, 52 Cal. 302, is a case where the husband and wife had accumulated property in Illinois which, under the laws of Illinois, became the separate property of the husband, and had removed to California, and the husband had invested it in real estate in the latter state, where the community property law prevails and under which the wife was entitled to one-half interest therein. The court held that the mere act of investing the husband's separate property accumulated in the state of Illinois in property in the state of California did not change the nature of the ownership or of the title by which the property was held, and that it would still remain the separate property of the husband. The syllabus to that case says: "If husband and wife acquire personal property in one state and then remove to another state with the same, the law of the state where they lived when the property was acquired governs as to whether it is separate or community." This case was cited with approval in Shumway v. Leakey, 67 Cal. 458, 8 Pac. 12. It was again cited, approved, and followed in Estate of Burrows, 136 Cal. 113, 68 Pac. 488. In the Burrows case, a marriage took place in the state of Kansas, and the parties there accumulated considerable property. The state of Kansas, however, had no community property law, and in that state the husband is the absolute owner of all property acquired and accumulated during coverture. The parties moved to California, and there the property was invested, and the court held that the property acquired in California was held by the same title and ownership as that with which it was purchased. The court said: "All he had in Kansas belonged to him and was his separate property when he arrived in California, no matter whether it was acquired in Kansas before or after marriage. * * * He started from Kansas with money which was wholly his; I fail to see how the ownership was or could be changed by its removal here."

The community property law prevails in Texas, and in Blethen v. Bonner, 30 Tex. Civ. App. 585, 71 S. W. 290, the Supreme Court had under consideration a similar question where property had been accumulated by husband and wife in Massachusetts where the community property law does not prevail. The husband thereafter removed to Texas and invested the money in property in the latter state. The question arose as to whether under the community laws of Texas the wife acquired a community interest in the property. The court, among other things, said: "Lands in Texas, purchased by a married man, after moving there, with money which he earned in another state while a citizen thereof, under the laws of which the money was his separate property, are not community property." The court in that case was presented with the same proposition that is presented here, namely, that they were called upon to enforce the laws of a sister state within the borders of Texas. The court answered that question as follows: "It is suggested that this view involves the enforcement of the laws of a sister state by a Texas court in the disposition of property here situated. But not so. We have merely ascertained the law of Massachusetts as a fact in determining the quality or extent of the title to money acquired in Massachusetts by a citizen or citizens of that state, and thereafter brought into and invested in this state. It may seem that Massachusetts, the boasted center of advanced thought, should long since have discarded the rule invoked in behalf of L. B. Blethen, and relegated it to its place among the rejected barbarisms of the common law. But, whatever may be our opposition to the common law in this particular, and the extent of our admiration for the rule of the civil law, so firmly embedded in the hearts and jurisprudence of the Texas people, that the fruits of the joint effort of husband and wife shall be shared equally between them, the power of the people of Massachusetts to determine for themselves the conditions upon which her citizens may acquire and hold property within her own borders must be conceded, and we have no power to alter the status of property fixed and vested by such laws before its introduction into this state. We have simply determined the character of L. B. Blethen's title to the money with which the lands in controversy were purchased as a fact, and applied thereto the law of Texas."

The Blethen case was followed and approved by the Court of Civil Appeals of Texas in Thayer v. Clarke, 77 S. W. 1050.

A somewhat similar principle of law was enunciated by the Supreme Court of Louisiana in Young v. Templeton, 4 La. Ann. 254, 50 Am. Dec. 563, where the civil law prevails from which the community property law was derived.

The community property law likewise prevails in the state of Washington, and in Brookman v. Durkee, 46 Wash. 578, 90 Pac. 914, 12 L. R. A. (N. S.) 921, 123 Am. St. Rep. 944, 13 Ann. Cas. 839, the Supreme Court of that state held that: "Where money acquired in the course of trade in another state is the separate property of the husband there, it will continue to be his property when brought into this state, as will property purchased here with it, whether real or personal, notwithstanding Ballinger's Ann. Codes & St. § 4490, providing that property acquired by a husband after marriage, otherwise than by gift, bequest, devise, or descent, is community property, since a contrary construction would destroy vested rights." To the same effect, see Elliott v. Hawley, 34 Wash. 585, 76 Pac. 93, 101 Am. St. Rep. 1016. The Brookman-Durkee case has been cited with approval in Colpe v. Lindblom, 57 Wash. 106, 106 Pac. 637, and Alaska Banking & Safe Deposit Co. v. Noyes, 64 Wash. 672, 117 Pac. 492.

It has been further argued in this case that, after an order of sale by the probate court had been made of this property on the theory that it was community property and the sale had been made and confirmed, the judgment became res adjudicata under the authority of Clark v. Rossier, 10 Idaho 348, 78 Pac. 358, 3 Ann. Cas. 231, and that an action will not thereafter lie in the district court questioning the title conveyed under the probate sale. As was said by this court in Miller v. Mitcham, 21 Idaho 741, 123 Pac. 941, "probate courts have exclusive, original jurisdiction in the settlement of estates of deceased persons, and it is within the jurisdiction of those courts to determine who are the heirs of a deceased person and who is entitled to succeed to the estate and their respective shares and interests therein. The decrees of probate courts are conclusive in such matters. A probate court, however, does not have jurisdiction to determine adverse claims or an adverse title to real estate, except in so far as such questions arise

between the heirs or devisees of an estate and are necessary to be determined in the administration of the estate." In other words, a probate court has no authority in the administration of an estate to order and confirm the sale of real estate which belongs to some one else and which did not in fact or law belong to the estate being administered. A decree in such a case could not and would not be conclusive or res adjudicata against the owner of such property unless he became a party to the proceeding and participated in the litigation and allowed the judgment to become final under the statute. In such a case he might be estopped raising the same question.

In this case it does not appear that appellant is urging his rights to the detriment of any one who relied upon the probate proceeding, or that the question here involved was litigated or attempted to be litigated in that proceeding. It is true that it was assumed that this was community property at the time of the administration; but no one acquired any right or interest under the probate proceedings which will be adversely affected by this decree so far as appears from the record. We conclude, therefore, that the probate proceedings are not a bar to this action, nor do they estop the appellant here from asserting his rights.

The judgment should be reversed, and it is so ordered, and the cause is remanded, with direction to take further proceedings in accordance with the views herein expressed. Costs awarded in favor of appellant.

CHAPTER XXXIII.

CURTESY.

Seisin as Basis for Curtesy.

BRAGG v. WISEMAN ET AL.

55 W. Va. 330, 47 S. E. 90, 1904.

Suit by W. W. Bragg against F. J. Wiseman and others. Decree for defendants, and plaintiff appeals. Reversed.

BRANNON, J. Wiseman died seised of some land, leaving nine children, to whom it descended. One of these children, Minerva, married Wriston, and by him had four children. Her husband having died, Minerva Wriston married Bragg, and in 1891 died, leaving her husband and said four Wriston children. Bragg, under claim to curtesy in the one undivided ninth of said land, brought a suit in 1903 in the circuit court of Fayette county against the heirs of Wiseman and the heirs of Minerva Wriston, seeking partition of the land so as to have the ninth of Minerva Wriston set apart in severalty. Upon demurrer to the bill it was dismissed, and Bragg appeals.

* * * * * * * * * * *

The appellees also make the point that Bragg does not show a curtsey estate vested in him, because the bill does not allege that his wife had seisin in fact during her life. This presents a question akin to that mentioned above, but somewhat different, since, to defeat a right by limitation, facts giving ground for the bar must appear, whereas, as to curtsey, the claimant must state facts giving it to him. The law requires a seisin in fact to give curtsey, seisin in law not giving it. Fulton v. Johnson, 24 W. Va. 95. The bill says that Wiseman died "seised and possessed" of the land. It does not say in words that he had seisin or possession in fact. Is it necessary to expressly aver seisin in fact? This puts the question whether, when one dies seised in fact of land, his heirs get from him that seisin in fact

which he had, without entry after his death. I think we may say as to Wiseman that he had seisin in fact. Most books speak to the effect found in 1 Lomax, Dig. 5: "Where a freehold estate is conveyed to a person by feoffment, with livery of seisin, or by any of those conveyances which derive their effect from the statute of uses, he acquires a seisin in deed and a freehold in deed. But where a freehold estate comes to a person by act of law, as by descents, he only acquires a seisin in law—that is, a right to the possession—and his estate is called a freehold in law. For he must make an actual entry on the land to acquire a seisin and freehold in the deed." This seems unreasonable. Where the ancestor is not in actual possession, and thus has not seisin in fact, it is rational to say that his heir has not seisin in fact; but where the ancestor has seisin in fact, why does it not go by law to the heir? Under the doctrine given in Lomax, Coke says that "if a man dies seised of lands in fee simple or fee tail general, and they descend to his daughter, who marries, has issue, and dies before entry, the husband shall not be tenant by the curtesy; yet in this case the husband had seisin in law. But if she or her husband had entered during her life, he would have been tenant by curtesy." 1 Inst. 29a; 1 Greenl. Cruise, 140. But some books do not lay down the doctrine of seisin as quoted from Lomax. 1 Washburn on R. Prop., § 97, says that, where the possession is vacant at the ancestor's death, the heir has only seisin in law; and in volume 3, § 1953, says: "There is a seisin in deed and a seisin in law, and the difference between the two is that in one case an actual possession has been taken, and in the other there is a right like that of an heir upon descent from his ancestor, while the possession is vacant, before he has made an actual entry." Coke upon Lit. (by Coventry) 266b, says that it is only where the ancestor is out of actual possession that descent cast on heirs mere seisin in law. Hilliard on R. Prop. 82, says entry by the heir is not necessary. The prevailing doctrine of the United States is that no actual entry is necessary, either by an heir or grantee, in order to give him a seisin in deed, provided the ancestor or grantor was seised at the time, or the possession was vacant (not in a disseisor), "and the ancestor or grantee had the right." Kerr on R. Prop., § 232.

There is another consideration, seemingly decisive, to show

that an heir gets his ancestor's seisin in fact without entry. By common law, in order that one might as heir inherit from another, that other must have had seisin in fact, not mere seisin in law. If the ancestor had no seisin in fact, nothing could be inherited from him, but the estate went from the last person having seisin in fact, under the maxim, "Seisina facit stipitem" —seisin makes or points to the root of descent. 1 Lomax, Dig. 586; 2 Minor, Inst. 525; 4 Kent, 385. But this common-law rule was wiped away by the statute of descents of Virginia passed in 1785, saying that "henceforth, when any person having title to any real estate of inheritance, shall die intestate as to such estate, it shall descend and pass" to certain persons. Such is our Code of 1899, c. 78. Under this statute it is not necessary that there be conjunctio seisinæ et juris—a union of seisin and title—or both possession and title in a person, to enable his heirs to take from him by descent whatever he has.

"The common-law rule, 'Seisina facit stipitem,' may now be regarded as abrogated in Virginia, and estates of intestates, whether in possession or vesting in title, whether present or reversionary, will all of them descend to the same heir, without any regard to the seisin of the ancestor." 1 Lomax, Dig. 594. See 4 Kent, § 88. So, whatever the title or right a man has descends to his heir. If he has title merely, that descends. If he has title, and under it actual possession, that title and that possession both descend, as possession is a valuable element of title. Therefore, when Wiseman died, his actual possession vested in Minerva Wriston and her co-parceners, and she had seisin in fact. But if this were not so, the bill saying that Minerva Bragg died "seised and possessed," it imports seisin in fact. "Seised," if it does not alone mean that the person is in possession, imports title of inheritance, and the two words combined signify that the party is in actual possession of an estate of inheritance. Seim v. O'Grady, 42 W. Va. 77, 24 S. E. 994, tends to support this decision. And if the other Wiseman heirs were in possession, their actual possession was that also of Minerva Bragg, she being a parcener, and that possession gave Bragg right to curtesy, even if she or he were not on the land. Kerr on R. Prop., § 732.

Decree reversed, demurrer to bill overruled, and remanded.

CHAPTER XXXIV.

DOWER.

When Dower Barred.

HOUSE v. JACKSON.

50 N. Y. 161. 1872.

PECKHAM, J. The statute declaratory of the common law enacts that a widow shall be endowed of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage: 1 R. S. 740, § 1.

It is not necessary that the husband should have been seized of a fee simple absolute, to enable the wife to have dower. If he was seized of an estate in tail male, or of the heirs of his body, she shall have dower: Lit. § 53, 40a; Com. Dig., title Dower, A. 6.

"Thus, generally, in every case where the issue which the husband may have by his wife by possibility may inherit, his wife shall be endowed:" Com. Dig. title Dower, A. 6; Park on Dow. 79; Perk., § 301; Lit., § 52.

So, where the husband is seized of a base or conditional fee, or of a fee with a determinable quality attached to it, she has dower.

The dower will attach subject only, when the determinable quality arises from defect of title, to be defeated by the avoidance of the estate of the husband: Park on Dow. 49; Ib. 37.

So, if the husband have a defeasible estate in fee tail, his wife shall be endowed till his estate be defeated: Com. Dig. Dower, A. 6, and cases cited.

So, her dower terminates, if the conditional or base fee be ended, and the grantor enter for condition broken: Beardslee v. Beardslee, 5 Barb. 324.

"The seisin must be of an estate of inheritance, conferring the right to the immediate freehold, as the result of one entire limitation, or several consolidated limitations:" Park, 47.

Seisin of a vested remainder is not sufficient to give dower. So plain a point is decided in this court: Durando v. Durando, 23 N. Y. 331.

I see no objection to the merger of this life estate of John Jackson, the father, in the vested remainder of his son, the husband of Mary L. Jackson, under the decision of Moore v. Littel, 41 N. Y. 66. This is a part of the same estate there adjudged. If the son should die in the lifetime of the father, I think the better opinion is that the estates divide again, and the widow is then not entitled to dower.

Moore v. Littel holds the estate of the son, prior to the death of the father, to be a vested remainder; the son was also seized in fact and in law of his father's life estate, and then became seized of the inheritance, subject to being defeated by his own death, prior to the decease of his father. In such case I think the wife has dower, subject to being defeated by the same means. The plaintiff claims that the sale of the son's life estate upon execution cut off his title.

It is a settled rule of the common law, laid down in the elementary books, that after dower has once attached, it cannot be extinguished or suspended by any act of the husband alone, in the nature of alienage or charge: Park, 191.

The rule is adopted in much broader language in our statute: 1 R. S. 742, § 16.

At common law there might have been an intermediate estate for years and yet the wife had dower—as estates for years were not highly regarded at common law. But cessit executio during the term: Com. Dig. Dower, A. 6; Perk., § 336.

So, if there be a mesne remainder for life, who surrenders his estate to the tenant for life (Ib.), though the surrender be upon condition, for the estate is gone until the condition be broken: Ib.

In this case there is no intervening estate. The husband is seized of the life estate in fact and in law, and he is also seized of a vested remainder as adjudged, subject to be defeated of the remainder by his death prior to that of his father.

This is such a seisin as prevents the alienation of the estate or its incumbrance, to the prejudice of the wife's dower. In other words, dower attaches to such an estate, subject to be defeated as above stated, and as the husband survived the father,

her dower becomes absolute. The decree must be modified according to these views, with costs to her—no costs to either of the others, and the cause remitted for further proceedings.

Judgment modified in accordance with opinion, and affirmed as modified.

Conveyance in Fraud of Dower—Enforcement—Homestead.

DUNBAR v. DUNBAR ET AL.

254 Ill. 281, 98 N. E. 563. 1912.

Suit by Anna C. Dunbar against Charles L. Dunbar and others to establish dower and homestead rights. There was a judgment granting relief, and defendants bring error, and complainant assigns cross-errors. Reversed in part and remanded, and affirmed in part.

VICKERS, J. Anna C. Dunbar, whose maiden name was Anna Cardiff, filed a bill in the circuit court of Henry county against Charles L., Harry, Orson, and Albertus Dunbar for the purpose of having her dower and homestead rights assigned to her in certain real estate which was owned prior to her marriage to him, by her deceased husband, Washington Dunbar. A trial in the circuit court resulted in a decree finding that complainant, Anna C. Dunbar, was entitled to her dower in the said lands but not entitled to a homestead; the court holding that as to the homestead complainant had lost her right to that estate by abandonment. The defendants below, who are the sons of Washington Dunbar by his first marriage, have sued out a writ of error to bring up for review the decree of the circuit court finding that complainant below was entitled to dower, and she has assigned appropriate cross-errors to obtain a review of the decree below in respect to her homestead rights.

The material facts set out in the bill of defendant in error and proven on the hearing are as follows: Washington Dunbar in the year 1900 was a widower 78 years of age, and resided on his farm, consisting of 320 acres of valuable farm lands in Henry county. He had been married and had six children by his first wife, all of whom were grown up and had homes of their own. He resided on his farm with no one in the house

with him except an employed housekeeper. His life was lonely and he longed for companionship. Through friends he was introduced to defendant in error, an unmarried woman who was making her own living by working at dressmaking. After talking with defendant in error, he on the 4th day of February, 1900, proposed marriage to her and an engagement resulted. At the time the engagement took place he was the owner in fee simple of 320 acres of farm lands located in Henry county, estimated to be worth about $50,000, and nineteen acres of timber land in Knox county, which was not of great value, and a small amount of personal property, consisting of live stock and household furniture. He told defendant in error, at the time she accepted his proposition to marry him, that he owned this property and that it was clear of all incumbrances and that she should have her full share in his estate. The matter of making a contract settling defendant in error's property rights was discussed. He offered to contract with defendant in error, giving her a one-third interest in all of his estate. Defendant in error said that she thought that would be unfair to his children, and that she would be satisfied if he would arrange for her to take a child's part in his estate. He had two daughters, who are parties to this suit—six children in all. A child's part, as suggested by defendant in error, would have been one-seventh instead of one-third, as he offered to give her. The subject of settling defendant in error's property rights was discussed by her and him at different times, but a contract was never in fact made. Some time after the engagement became known, he told defendant in error that he could not make the contract, that his children would not allow him to do so, but that he would provide for her in another way that would be better than a contract, and outlined a plan by which he thought he would be able to protect his intended wife in her rights. On the 19th of April, 1900, he, without the knowledge or consent of the defendant in error, conveyed to each of his four sons eighty acres of the 320 acres of land in Henry county. These deeds were executed and delivered to the several grantees and placed upon record, and the fact of their execution was concealed from defendant in error until several weeks after the marriage was consummated, which occurred June 7th. Information in regard to the conveyances was obtained by defendant

in error in September after her marriage in June, and came to her by mere chance, through persons other than her husband or plaintiffs in error. Soon after defendant in error ascertained that her husband had conveyed all of his real estate, except the nineteen acres of timber land, to his sons, she consulted a lawyer in regard to her rights and what steps, if any, she should take to secure them. She retained a lawyer to represent her. Plaintiffs in error were notified by Mr. Anderson, of Galva, who was the attorney employed by defendant in error, that defendant in error would insist upon her marital rights in her husband's real estate. After the marriage in June, the defendant in error went with her husband to his home and resided there with him as his wife until her husband's death, which occurred in October, 1907. After the death of her husband a petition was filed in the county court to sell the nineteen acres of timber land to pay debts, and the same was sold, and defendant in error received $90 as her dower interest. This appears to be all that defendant in error has received, by reason of her right to dower, out of the real estate of her deceased husband. On behalf of plaintiffs in error it is contended that at the time the deeds were made they had no knowledge of the marriage contract existing between their father and defendant in error. It is also contended that they are purchasers, for a valuable consideration, of the respective parcels of real estate conveyed to them. It is also shown that after the execution of the deeds each of the plaintiffs in error went into the possession of the eighty acres conveyed to him, and has occupied the same, paid the taxes thereon, and made valuable and lasting improvements on the land. It is also shown that each of the plaintiffs in error agreed to pay Washington Dunbar $200 per annum as long as he lived, and that said sums have all been paid by plaintiffs in error. It is also shown that at the time Washington Dunbar conveyed his lands to his sons he required each of the sons to execute a mortgage upon the respective parcels of land conveyed, to his daughters, Effie Snyder and Adelia Winnie, for $1,125, making a total incumbrance in favor of the two daughters of $4,500 upon the 320 acres of land. Plaintiffs in error have severally enjoyed the rents and profits arising from the use of the lands conveyed to them, respectively, since the conveyances were made, free of all rent or other charges except

the $200 per annum paid by each of the plaintiffs in error to their father during his lifetime. The rental value of the lands conveyed is shown to be about $6 per acre per annum.

The foregoing statement embraces the substance of all the facts that are necessary to determine the questions that are raised by plaintiffs in error. The facts bearing upon the cross-errors assigned in regard to the abandonment of the homestead by defendant in error will be referred to hereinafter, in connection with the consideration of the question in regard to the homestead.

The law in this state is well settled that a voluntary conveyance by either party to a marriage contract of his or her real property, made without the knowledge of the other and on the eve of marriage, is a fraud upon the marital rights of such other, and may be set aside as fraudulent and void as against the party whose rights are injuriously affected by such conveyance. Daniher v. Daniher, 201 Ill. 489, 66 N. E. 239, and cases there cited. Under the law of this state a conveyance made after a contract of marriage has been entered into, even though it is voluntary, is not conclusively presumed to be fraudulent, although in other jurisdictions the rule seems to be otherwise. Ward v. Ward, 63 Ohio St. 125, 57 N. E. 1095, 51 L. R. A. 858, 81 Am. St. Rep. 621; Arnegaard v. Arnegaard, 7 N. D. 475, 75 N. W. 797, 41 L. R. A. 258. Following the rule laid down in Champlin v. Champlin, 16 R. I. 314, 15 Atl. 85; Hamilton v. Smith, 57 Iowa 15, 10 N. W. 276, 42 Am. Rep. 39, and Fennessey v. Fennessey, 84 Ky. 519, 2 S. W. 158, 4 Am. St. Rep. 210, this court, in Daniher v. Daniher, supra, 201 Ill., on page 494, 66 N. E., on page 240, laid down the rule as follows: "But we think the better rule is that, where any such voluntary conveyance is made without the knowledge of the other of such contracting parties, it presents a prima facie case of fraud, subject to be explained by the parties interested, and the burden is on the grantee to establish the validity of the deed."

In the case at bar there is no dispute about the existence of a marriage contract at the time the conveyances to plaintiffs in error were made. It is not denied that Washington Dunbar told defendant in error that he owned 320 acres of as good land as there is around, and that the same was free from incumbrances, and that he intended to keep the title in his name as

long as he lived. There is no controversy in the evidence as to the fact that defendant in error believed, when she married, her husband was the owner of the 320 acres of land, and that all knowledge of the conveyances in question was carefully kept from her until she received information through other persons. It is also admitted by plaintiffs in error that no money consideration passed from them to their father for the conveyances at the time the deeds were made. It is true that they agreed to pay their father $200, each, during his natural life and assumed an obligation of $1,125 to their sisters; but when the rental value of the land is taken into account it can readily be seen that plaintiffs in error did not assume any obligation that the rents on the land have not more than paid during the seven years that they have, respectively, enjoyed the rents and profits of their several parcels of land. Assuming the rent of the lands to be $6 per acre, the rent of the 320 acres would bring a total of $1,920 per year, or a grand total of $13,440 for the seven years which plaintiffs in error have enjoyed the use of the premises. Plaintiffs in error have paid their father $800 a year for seven years, or a total of $5,600, and agreed to pay their sisters $4,500, making a total of $10,100, which, deducted from the $13,440, leaves a balance of $3,340 in favor of plaintiffs in error, and in addition thereto they claim to have the fee-simple title to valuable farm lands, conservatively estimated to be worth $50,000; and in the face of these facts plaintiffs in error claim to be bona fide purchasers of the land against defendant in error, who has received $90 as her dower interest in her husband's estate. When these facts are considered in connection with the time when the conveyances were made and the studious concealment of the facts from defendant in error, we have no hesitation in holding that the court below did not err in finding that these conveyances are fraudulent, in law, as against the marital rights of defendant in error.

It is contended by plaintiff in error Harry Dunbar, to whom the "home eighty," as it is called, was conveyed, that as to him the decree is erroneous because it is claimed that there was an antecedent parol contract between Washington Dunbar and his son Harry that the father would convey to him the home eighty in consideration that Harry would remain with him and cultivate the home eighty and take care of his father during the

balance of his life. The general rule is that a claim for dower is subject to every lien or incumbrance, at law or in equity, which exists before the right to dower attaches, and it has frequently been decided that a conveyance made for the purpose of carrying out a previous valid contract is good against a claim of dower. Daniher v. Daniher, supra, and cases there cited. Conceding this to be the established rule, still, before it can be invoked to shield such a conveyance from the imputation of fraud, the grantee must show such a state of facts as would have entitled him to a decree for specific performance had the conveyance not been made. In other words, to sustain the conveyance it must be shown to have been made by the grantor in the discharge of some legal or equitable obligation which the law would recognize and enforce at the instance of the grantee, as contradistinguished from a mere moral obligation growing out of some unenforceable promise. The evidence is that Washington Dunbar owned four eighty-acre tracts of land, and he had four sons; that frequently, in discussing the distribution that he contemplated making among his sons, he referred to the home eighty as intended for Harry. In fact, it is shown that during his first wife's lifetime this was the general family understanding, and at one time it even went to the extent of taking the form of a last will in which the home place was devised to Harry, but for some reason not material here the will never became operative. We do not regard the position of Harry Dunbar as materially different from that of his brothers. Under the evidence in this case he clearly could not enforce the specific performance of the alleged contract: First, because the contract was not in writing, and there was no such part performance as to take the contract out of the operation of the statute of frauds; and, second, possession of the premises was retained by the father until his death, although Harry cultivated the premises under his father's direction and authority and paid rent therefor prior to the time the deed in question was made.

The position of plaintiffs in error is not strengthened by the fact that a considerable amount of money was expended by each of them for substantial and permanent improvements upon their several tracts. All of these improvements were made after defendant in error had served notice upon plaintiffs in error

that she would insist upon her marital rights in her husband's land. The expenditure of money by the plaintiffs in error under these circumstances cannot create a new equity or strengthen any already existing in plaintiffs in error.

The court below held that defendant in error was not entitled to a homestead in the land upon which the residence was located, at the time of her husband's death, and upon this ruling the defendant in error has assigned cross-errors. Assuming that the deed to Harry Dunbar of the home eighty was fraudulent as against the rights of defendant in error, she would be entitled to a homestead unless she has lost that right by abandonment. Plaintiffs in error claim that the homestead was abandoned by the widow after the death of Washington Dunbar, and that she thereby lost all right to have a homestead assigned to her. The court below held that the homestead had been abandoned. The evidence is that the defendant in error, soon after her husband's death, left the homestead and moved most of her household goods to Galva, where her stepmother lived. Before going away defendant in error consulted an attorney as to whether it was necessary for her to remain in the residence in order to hold her homestead right, and she was advised that as long as she retained the possession it was not necessary that she should actually live in the house. Accordingly, defendant in error stored a part of her household goods in one room and locked the house and retained the key, and refused to surrender the key when it was demanded of her. She always claimed that she retained possession of the house. After she went to her stepmother's, she testifies that Orson Dunbar, one of plaintiffs in error, threatened that if she ever came back he would kick her off the place. Defendant in error acquired no homestead elsewhere. She did not intend to abandon any right that she had when she left her home and went to her stepmother. The possession of the house was obtained without the consent of defendant in error. Under these facts we think the court erred in holding that defendant in error had abandoned her homestead. It is not necessary that a widow should personally reside upon her homestead under the statute, in order to hold the same. She may leave it unoccupied indefinitely if she intends to return to it and occupy it, or she may lease it and enjoy the rents. In the case before us, defendant in error was

alone, and her relations with plaintiffs in error were not cordial. Her stepmother was sick and needed her assistance. Led by a kindly and sympathetic spirit for her stepmother, which is conspicuously absent from all the acts of plaintiffs in error toward the one who sustained that relation to them, she went and ministered to her wants. This accounts for her leaving her homestead. She did all that she could do, unless she continued to live in the house alone, to manifest her intention to retain her residence in the homestead. Under these circumstances we are constrained to differ from the learned chancellor who tried the cause below, and must hold that there was no abandonment of the homestead.

In so far as the decree adjudges that the defendant in error, as the widow of Washington Dunbar, is entitled to dower in the 320 acres of land conveyed to plaintiffs in error, the decree is affirmed; but, in so far as the decree finds that defendant in error is not entitled to a homestead upon the eighty acres conveyed to Harry Dunbar, it is reversed on the cross-errors and the cause remanded to the circuit court of Henry county for further proceedings in accordance with the views herein expressed.

Reversed in part and remanded.

Release of Dower.

IN RE RAUSCH.

35 Minn. 291. 1886.

MITCHELL, J. Assuming the instrument (Exhibit A) to be in terms sufficient, if valid, to effect such a result, the question in this case is whether a married woman can, by contract with her husband, release and relinquish to him her incipient or inchoate interest as wife in his real estate, so as to exclude her, as widow, from dower. We use the term "dower" because although "dower," strictly so-called, no longer exists in this state, yet the provisions of the present statute for the widow in the real estate of her deceased husband are rather in the nature of an enlargement than an abolishment of dower, and this inchoate right, under the statute, is of the same general nature as the inchoate right of dower at common law. It was a well-

The sole question is whether the homestead set apart to Mrs. Carter and her dependent daughter terminated on the death of Mrs. Carter. We think the homestead did terminate at her death.

In the case of Towns v. Mathews, 91 Ga. 546, 17 S. E. 955, it was held: "A homestead set apart in 1873, by the head of a family, for the benefit of his wife and a minor granddaughter, terminated on arrival at majority of the granddaughter; the family having been previously dissolved by the death of both the other members. The condition of the granddaughter as a dependent female would not extend the duration of the homestead; the person on whom she was dependent being no longer in life." And see Haynes v. Schaefer, 96 Ga. 743, 22 S. E. 327. In the case of Jones v. McCrary, 123 Ga. 282, 51 S. E. 349, this court held: "An applicant took a homestead in 1869 as the 'head of a family,' consisting of himself and eleven children—four sons and seven daughters. The applicant died in 1885, after all of the children had reached majority. Four of the daughters were living on the place with him at the time of his death, and have continued to live on it and support themselves out of its proceeds. Held, that the only claim of the four daughters as beneficiaries of the homestead was as dependent relatives of the applicant, and when he died their dependence ceased and the homestead estate was at an end."

And on page 285 of 123 Ga., on page 351 of 51 S. E., Mr. Justice Chandler, in discussing the question now before the court, said: "Homesteads for the benefit of families of minors have uniformly been held to terminate with the arrival at majority of the beneficiary; and by parity of reasoning, a homestead for the benefit of a family of dependent females must terminate when dependence terminates. But dependence upon what—the property, or the applicant for homestead? We confess that it seems more logical and consistent with former rulings of this court to hold that the dependence should be upon the property, rather than the applicant. But the question has been positively answered in the case of Towns v. Mathews, supra, where it was said: 'The general fact of dependency alone would not be sufficient to keep the homestead in existence, because it has to be a dependency upon some person in life

entitled, because of such dependency, to take a homestead.' Tested by this rule, then, the homestead in the present case expired with the death of Ezra McCrary in 1885, and the court below erred in holding that it was still in existence." See Vornberg v. Owens, 88 Ga. 237, 14 S. E. 562. In Neal v. Brockhan, 87 Ga. 130, 132, 13 S. E. 283, it was said: "When, therefore, the mother died and the children became of age, according to the repeated rulings of this court, the homestead estate ceased and the land became subject to the liens of the creditors.

We do not think the fact that one of the minors became imbecile and dependent after the homestead was set apart, but before he became of age, would change this rule and keep the homestead estate alive. When the head of the family, to whom the homestead was set apart, died, the land descended to her children as her heirs at law; and after they became of age the homestead ceased. And if there had been no creditors, the children would have had the right to have the property sold or divided. There being a judgment creditor in this case, his lien, which had been inactive and held off since the homestead was set apart, became active and was leviable when the homestead estate ceased." And see the case of Sutton v. Rosser, 109 Ga. 205 (3), 207, 34 S. E. 346, 77 Am. St. Rep. 367, where it was held: "A homestead allowed to a widow out of her husband's estate for the benefit of herself and minor beneficiaries ceases when the widow dies and the minors arrive at majority."

But it is insisted by the defendant in error that the dependence here was upon the property, and not upon the life of the applicant for homestead; and we are asked to review the cases of Towns v. Mathews and Haynes v. Schaefer, supra, and to overrule the same, if they conflict with the decision of the court below and with the view taken of this case by the defendant in error. We think they undoubtedly conflict. We have considered the present case carefully, and also the cases asked to be reviewed, and, after doing so, decline to overrule them, and adhere to the rulings made in those cases. It is insisted by the defendant in error that there is a vast difference between the Constitutions of 1868 and 1877 as to the homestead rights of certain beneficiaries, that the Constitution of 1868 allowed

a homestead to "each head of the family * * * of minor children" (Code of 1873, § 5135), and that the Constitution of 1877 extended the class of beneficiaries and included "dependent females" (Civil Code, § 6582). It is ingeniously argued that, if the dependent female under the Constitution of 1877 acquired no individual right to the homestead in her own name, it was needless for the head of the family to take out a homestead as having females dependent upon her, but could have it set apart to herself simply as the head of a family, and that would suffice. But the reply is that under the provisions of the Constitution she can only avail herself of the benefits of the homestead because she is the head of a family of minor children, or there are females dependent upon her, and it is necessary to allege and show that fact in order to be entitled to the homestead, which is conditioned upon this fact being made to appear.

It is argued, further, that if a dependent female received no individual right to the homestead property after the death of the head of the family, the law would abandon and desert her at a time when she stood most in need of its beneficent influence and support. The reply again is that, in the present case at least, the dependent female is not left helpless and penniless. As an heir at law of her deceased mother, out of whose property the homestead was set apart, she is entitled to an absolute fee in an undivided one-sixth interest in her estate, and not merely the usufruct of the homestead property. Nor can it be supposed that the other heirs at law of the deceased mother will be less kind and generous in their help and support of this dependent female, who is related to them by blood, than the law itself was, if her share of the estate should prove insufficient for that purpose. At any rate, the law seems well settled in this state that the homestead estate ceases upon the death of the head of the family in a case like the present, whether the homestead be under the Constitution of 1868 or that of 1877.

The rule insisted upon in this case would prevent, or at least postpone, heirs at law from coming into possession of their inheritance. Both the claimant and the defendant in fi. fa. were heirs at law of the deceased mother, and each inherited an undivided one-sixth interest in the lands left by

her. It follows, from what has been said, that the undivided one-sixth interest of the defendant in fi. fa. in the land levied upon is subject to the fi. fa. as against the claim of the daughter, who enjoyed the benefits of the homestead estate as a dependent female during the life of her mother, but who has no further interest in it as such since her death. The court erred in directing a verdict for the claimant.

Judgment reversed. All the justices concur.

PART II

USE AND ENJOYMENT INCIDENT TO OWNERSHIP OF LAND

CHAPTER XXXVI.

RIGHTS APPURTENANT TO LAND.

Right to Take Oil.

RUPEL ET AL. v. OHIO OIL CO. ET AL.

95 N. E. 225 (Ind.). 1911.

Action by Martin L. Rupel and others against the Ohio Oil Company and others. From an adverse judgment, plaintiffs appeal. Reversed, with instructions.

See, also, 172 Ind. 300, 88 N. E. 508.

COX, J. The appellants, Martin L. Rupel, Isaac Rupel, Jacob Rupel, and Sarah Fields, are, together with appellees James Rupel and Rachel Artwine, the owners in remainder as tenants in common, each owning a one-sixth interest, of certain lands in Jay county. Appellee Mary Rupel, their mother, is the owner in possession of the life estate in these lands. As such life tenant in possession, she, without the remaindermen joining therein, sought to grant to the assignor of the appellee the Ohio Oil Company, by contract in writing executed January 20, 1891, the exclusive right to enter upon these lands and explore for, and to remove therefrom, the oil and gas found.

* * * * * * * * * * *

(2) It remains only to determine whether the complaint or either paragraph stated a cause of action against the Ohio Oil Company. It is the contention of counsel for appellees that it is within the rights of a life tenant to make a valid contract

to permit the search of the substance of the estate for oil and to profit therefrom when found. This contention is based on what seems to be the settled rule in this state that oil and gas which may underlie the real estate do not become the absolute property of the owner of the land until he has discovered them by exploration and mining his land and reduced them to his dominion. This is so because of their supposed wandering and vagrant character. But this rule of property does not in any way modify the general common law that the ownership of the fee of the surface of the earth carries with it the right to the minerals beneath, and the consequent right to extract them. This right is exclusive in the owner of the fee. The life tenant in possession has no such right, and, not having it, he cannot, of course, grant it to another. 16 Cyc. 625; Ohio Oil Company v. Indiana, 177 U. S. 190, 20 Sup. Ct. 576, 44 L. Ed. 729.

(3) Where oil underlies the surface of land, it cannot be denied that for the time it is physically a part of it. To recover it from the earth requires an assault on the integrity of the estate like, if different in degree, to the taking of other minerals, and when recovered from the earth, it is as much property as any other mineral in, or on, or underlying the land when severed from its physical connection with the earth it becomes personal property as other minerals do. The owner of the fee alone, or one to whom he has granted the right, may invade the substance of the inheritance to take one as well as the other. He may prevent one not entitled from taking one from the estate as well as the other, or, where the waste or trespass has been committed, he has his remedy in the one case as well as the other. 27 Cyc. 629, 630. In the case of Richmond Natural Gas Co. v. Davenport (1905), 37 Ind. App. 25, 76 N. E. 525, it was held that the owner of the fee might enjoin the life tenant in possession and her lessee from drilling for and removing oil and gas from the estate as waste. In that case it was said: "It is settled by numerous decisions that the natural gas or the petroleum which may be under the surface, and not reduced to the actual possession of any person, constitutes a part of the land, and belongs to the owner thereof in such a sense that he has the exclusive right by operations upon his land to reduce such mineral substance to possession and use and enjoyment and to grant the privilege of doing so to other

persons, though, until so reduced to possession, the mineral substance is subject to be taken by any other person by proper operations upon his own land, and that a person in possession who has such exclusive right in particular land, as owner of the land or as lessee or grantee with the privilege of extracting such minerals, may by injunction prevent operations for such purpose by others who have not rightfully acquired the privilege from the owner of the land in fee. The taking of these minerals by a stranger by means of wells made without right for such purpose constitutes a trespass, damages for which cannot be definitely measured. And the taking by one lawfully in possession of the surface, with right to enjoy the income and profits, but not the owner of the fee and not having received from such owner the privilege so to take the minerals—that is, by a tenant of the land for years or for life—constitutes waste." It has been held in this state that one who has been granted by the owner of the fee the exclusive right to take oil and gas from the land may enjoin the invasion of the right by a stranger. Indianapolis Natural Gas Co. v. Kibbey (1893) 135 Ind. 357, 35 N. E. 392; Consumers' Gas Co. v. American, etc., Co. (1903) 162 Ind. 393, 68 N. E. 1020; American, etc., Co. v. Tate (1904) 33 Ind. App. 504, 71 N. E. 189. It must necessarily follow that a like remedy would be available to the owner himself.

It is practically conceded by counsel for appellee that every owner of the fee has such a right in and control over the oil and gas underlying his land that the preventive remedy of injunction is his, but contended that, if he fails to deny access by the use of it, he cannot assert a right to compensation after the oil and gas has been wrongfully removed. This must lead to a position unmaintainable: That an owner who is present and has knowledge of a threatened injury to his estate may prevent the injury, while an owner absent with no knowledge of a threatened injury until after it has been fully accomplished is remediless. The statement of the proposition is in itself a refutation of its soundness. The law is otherwise, and has long been so. Anciently in England by the common law and early statutes the remedies for waste were the writ estrepement and prohibition of waste to prevent a threatened waste, and the writ of waste for the recovery of the estate and of damages for waste committed. The ancient preventive remedies have given way to the more modern

remedy of injunction now available in our practice. The writ of waste to recover damages for waste committed was succeeded by the common-law action on the case in the nature of waste, which, in turn, has become our code action for damages for waste or trespass in the nature of waste. 30 Am. & Eng. Encyc. of Law (2d Ed.) pp. 272-274; 22 Encyc. of Pl. & Pr. 1095 et seq.; Burns' Statutes 1908, §§ 288, 289.

(4) At common law the reversioner might sue the life tenant for damages for waste, but, as privity of estate between the parties was necessary to the maintenance of an action for waste, he might not sue one claiming under the life tenant or a stranger. This rule, however, no longer prevails, and the modern action to recover damages may be maintained against the life tenant or a subtenant or a stranger. 22 Encyc. of Pl. & Pr. pp. 1095, 1107, 1108, and notes. In harmony with the rule that has always prevailed, it is held in this state that the reversioner may not only enjoin the commission of waste by the life tenant, but may recover damages for that already committed. Miller v. Shields (1876) 55 Ind. 71; Stout v. Dunning (1880) 72 Ind. 343; Robertson v. Meadors (1880) 73 Ind. 43. Indeed, the statute so provides specifically as to the action for damages. Burns, §§ 288, 289.

(5) Equity will give an account for past waste, and, if it be of such a character that an action at law for damages will not give adequate relief, equity will give the remedy of account, even if an injunction may not be had. 30 Am. & Eng. Encyc. of Law (2d Ed.) p. 300; 16 Cyc. 644; 22 Encyc. of Pl. & Pr. 1135. A comparatively late case, that of Bender v. Brooks (Tex. 1910) 127 S. W. 168, was an action to recover the possession of a tract of land and for damages for oil taken therefrom, and the same rule of property in oil in the earth that prevails generally in this state and elsewhere was recognized. In the course of the opinion of the court it was said: "It is true that appellants, as owners of the land, had no specific title to the oil therein until it has been removed from the earth. * * * Appellants had the exclusive right as owners of the soil to take the oil therefrom; and the appellee by an invasion of their right and removal of the oil, no matter how innocently, could not acquire title thereto. It follows logically that since appellants owned this land from which appellee extracted the oil the oil so removed

became and was the property of appellants so soon as it reached the surface. Therefore they had a right to recover their property or its value." It was further held in that case that an account should be taken to ascertain the damages. In the case of Marshall v. Mellon, 179 Pa. 371, 36 Atl. 201, 35 L. R. A. 816, 57 Am. St. Rep. 601, while recognizing the inherent difference between oil and other minerals in the earth which prevents an absolute ownership in the former until it is taken possession of, it was held that with respect to the rights and interests of life tenants and remaindermen there is no departure from the common-law rule that tenants for life only may not open new mines, or take minerals from the premises except in case of mines opened by the former owner, and that a life tenant could neither open oil and gas wells or grant the right to another. The case of Williamson v. Jones, 39 W. Va. 231, 19 S. E. 436, 25 L. R. A. 222, is to the same effect, that a life tenant or one claiming under him may not drill wells and take oil from the estate, and, when it is done, that the owner of the fee may enjoin the waste or trespass, and have an account for that committed. See, also, the further exhaustive consideration of the same case, 43 W. Va. 562, 27 S. E. 411, 38 L. R. A. 694, 64 Am. St. Rep. 891; Gerkins v. Kentucky Salt Co., 100 Ky. 734, 39 S. W. 444, 66 Am. St. Rep. 370. We believe the cases and books cited indicate the law applicable to the case made by the two paragraphs of the complaint under consideration in this case, and it follows that the trial court erred in sustaining the demurrer of appellee oil company to each of them.

CHAPTER XXXVII.

FRUITS OF THE SOIL.

Emblements.

REIFF v. REIFF.

64 Pa. St. 134. 1870.

This is an action of trespass, brought to recover damages for cutting and carrying away a quantity of grass, growing upon a tract of about 152 acres of land, which had been leased to the plaintiffs by Mary Reiff, their mother, and widow of John Reiff, deceased.

* * * * * * * * * * * *

READ, J. The plaintiffs in error were the lessees of a farm of 152 acres, from their mother, a widow, who had a life estate in it under the will of her husband, their father. They were annual lessees from the 1st April, 1866, 1867, and 1868, the widow dying on the 15th June, 1868. At the time of her death, there was standing uncut on the premises, a quantity of mixed timothy and clover grass, a quantity of grass, part meadow and part timothy, and a quantity of timothy exclusively. The question was, was this grass emblements, belonging to the tenants of the deceased owner of the life estate. The vegetable chattels called emblements are the corn and other growth of the earth which are produced annually, not spontaneously but by labor and industry and thence are called fructus industriales. The growing crop of grass, even if grown from seed, and though ready to be cut for hay, cannot be taken as emblements: because as it is said the improvement is not distinguishable from what is natural products, although it may be increased by cultivation: 1 Williams on Executors, 670, 672.

The learned Judge in the Court below is a practical farmer, thoroughly acquainted with the established usages of our State, and we have no hesitation in agreeing with him that this crop of hay was not emblements, and belonged to the executors of the testator. Judgment affirmed.

Standing Forest Trees Are a Part of the Realty.

COCKRILL v. DOWNEY.

4 Kan. 427. 1868.

BAILEY, J. This was an action for trespass, commenced before Alonzo Cottrell, J. P., by plaintiff in error, against defendant in error, to recover the value of three loads of wood, hauled from the land of the plaintiff in error, by the defendant in error, claiming triple damages under the provisions of ch. 208 of the Comp. L. The action was commenced on the 28th day of December, 1866, and, after several continuances, was tried by a jury, who found a verdict for the plaintiff. The defendant appealed, and the cause was again tried at the April term of the District Court of Marshall County, 1867, and judgment rendered for the defendant.

The plaintiff in error, who was also the plaintiff below, now brings the case to this Court to procure a reversal of the last-mentioned judgment.

It appears from the bill of exceptions that the defendant, Downey, and one Abraham Gossuck, were the former owners of the land on which the alleged trespass was committed, and that Gossuck and wife conveyed all their interest in the land to Caloni Walworth, by deed dated February 10, 1865, and that subsequently, on the 28th of August, 1865, defendant Downey, conveyed all his interest in said land to Walworth, without any reservation whatever, and that said Walworth conveyed the land to plaintiff by deed of warranty, without reservation.

On the trial, the defendant filed no answer to plaintiff's petition on appeal, but offered himself as a witness to prove, with others, that there was a parol reservation of the dead and down timber in the deed from Downey to Walworth, and also in the deed from Walworth to plaintiff, Cockrill. Objection was made to this evidence, but the objection was overruled by the Court, and the evidence admitted. We think the Court erred in admitting the evidence. The policy of our laws, as evinced by the whole tenor of legislation as to registration of deeds and the like, is to make titles to real estate depend upon the written deeds of the parties, leaving the smallest possible margin for parol contracts, understandings, and reservations.

A deed of land must be, we think, deemed to involve all timber standing or growing on it, unless specially excepted. As to trees standing and growing in the soil, we apprehend that no question would be made; but a tree may be standing and not growing, or growing in a horizontal position, not standing.

Must the law apply a different rule in each case? Suppose the case of trees prostrated by a tornado, but with roots still adhering to the soil; shall they pass by the deed, or be reserved by parol? Obviously, such trees must be considered as part of the realty, and we think that there can be no safer general rule than that founded on the old maxim, "Cujus est solum ejus est usque ad caelum," which may, perhaps, be liberally translated: "The owner of the soil owns from the centre of the earth up to the sky." Various qualifications and limitations have been established as to fixtures, emblements, and the like; but we find no judicial warrant or authority for the claims of the defendant in this case.

The judgment must be reversed, and the case remanded for a new trial.

CHAPTER XXXVIII.

WASTE.

Equitable Waste.

DUNCOMBE v. FELT.

81 Mich. 332, 45 N. W. 1004. 1890.

LONG, J. The bill was filed in this cause for an injunction to restrain the defendant from cutting and removing any of the timber or trees standing or growing upon the premises described in the bill, and from committing or permitting any waste of said premises. The bill alleges that complainant is the owner in fee of the premises, containing about 160 acres, subject to a life-estate in the defendant. That the complainant derived his title through a sheriff's deed, upon an execution sale to satisfy a judgment against Seth H. Felt. That said Seth H. Felt derived his title through a deed made and executed to him by the defendant, Horatio O. Felt, and his wife. That at about the time of conveyance of said premises to Seth H. Felt he made, executed, and delivered a lease in writing to Horatio O. Felt and wife. This lease is set out in full in the record. The bill also alleges that said Horatio O. Felt is in actual possession and occupancy of the premises under and by virtue of said lease, and that his wife is now deceased. That upon about nine acres of said premises is growing and standing a large amount of valuable oak and other timber, fit for sawing and lumbering purposes, and that said timber constitutes a large portion of the value of said premises. The bill then states: "Your orator further shows that the said Horatio O. Felt has caused to be cut, and is causing to be cut, and is cutting, lumbering, and removing from said premises, a large portion of said timber and trees growing thereon, and threatens to continue so to do, and has already cut about five acres of said timber. Your orator further shows that thereby the said Horatio O. Felt is committing waste upon said premises and irreparable injury thereto, and materially lessening the

value thereof. Your orator further shows that if the said Horatio O. Felt is permitted to continue to cut down said timber and lumber, and commit waste upon said premises, as aforesaid, and is not restrained from so doing by an order and injunction of this honorable court, the value thereof will be depreciated to the amount of at least five hundred dollars. And your orator further shows that said cutting and removing said timber and said lumber upon said premises by said Felt has been and is being done without the authority or consent of your orator, and against his wishes and direction thereon, and without any authority or right in said Felt to do so. All of which actings and doings of the said Horatio O. Felt, who is made defendant herein, are contrary to equity and good conscience, and tend to the manifest wrong, injury, and oppression of your orator." The lease set out in the bill of complaint as executed before the complainant derived his title under the sheriff's deed, and contains the following clause: "To have and to hold the said demised premises, with the appurtenances, unto the said parties of the second part, their executors, administrators, and assigns, for and during and until the full end and term of their natural lives, so long as either of them shall live, yielding and paying therefor, during the continuance of the lease, unto the said party of the first part, nothing; this lease being given in consideration of the second parties having conveyed the premises herein described to the first party, and under no consideration whatever are the second parties to be removed from the possession of the said premises except as they shall voluntarily surrender their rights under this lease. And it is expressly understood that the second parties are to have as full and complete control of said premises, while they or either of them shall live, as though such conveyance had not been made." A general demurrer was filed, and on the hearing of the court below was overruled, and decree entered for complainant making the injunction perpetual. Defendant appeals.

The claim of counsel for the complainant is that on the premises there is only about nine acres of growing timber; that this timber is needed for the use of the farm, and its destruction makes a case of actionable waste, to be restrained by injunction. The rights of the parties must be determined by the construction given to these clauses in the lease above granted. The

title to the premises was in defendant, Horatio O. Felt. When he and his wife deeded the same, they took back this lease, by the terms of which they were to have and to hold the premises "for and until the full end and term of their natural lives, so long as either of them shall live, yielding and paying nothing." The consideration was the conveyance of the premises to Seth H. Felt. It is further provided in the lease that the lessees are not to be removed from the premises on any consideration whatever, except as they might voluntarily surrender their rights under the lease. Then follows the clause which it is claimed gives the defendant the right to take the timber in question. "And it is expressly understood that the second parties are to have as full and complete control of said premises, while they are or either of them shall live, as though such conveyance had not been made." The complainant acquired all the rights in the premises under his purchase at the execution sale that Seth H. Felt had, but with notice of all the conditions in this lease. It is therefore contended by counsel that the lease gave defendant the same interest or property in the estate as he had before he and his wife conveyed the lands to Seth H. Felt, and that he can deal with it in all respects as though he was the owner, the only limitation being that of duration of the estate, and that the clauses in the lease above set out in effect are equivalent in meaning with the old clause in leases without impeachment for waste.

Counsel for defendant insists that the doctrine laid down in Stevens v. Rose, 69 Mich. 260, 37 N. W. Rep. 205, fully sustains his claim that the defendant has the right to remove this timber, and do all other acts that he could have done as owner in fee, and that the defendant's estate is not impeachable for waste. His claim is not sustained by that case. It was there held that the words "to have and to hold, and to use and control as the lessee thinks proper for his benefit during his natural life," clearly import a lease without impeaching for waste, and that the defendant had the right to do all those acts which such a tenant may exercise, but that the words were not to be treated as importing a license to destroy or injure the estate, but to do all reasonable acts consistent with the preservation of the estate which otherwise might in law be waste. In the present case it is conceded that there is only 9 acres of timber on the whole 160-

acre tract, and that the defendant has already cut about 5 acres, and threatens to cut and carry away the remainder. I have never understood the rule of the common law to be so broad as contended for by counsel for defendant. The clause "without impeachment for waste" never was extended to allow the very destruction of the estate itself, but only to excuse permissive waste. 10 Bac. Abr., p. 468, tit. "Waste." In Packington v. Packington, decided in 1744, and cited by Bacon (reported 3 Atk. 215), the plaintiff alleged that the defendant, Sir H. Packington, had cut down a great number of trees, and had threatened to cut down and destroy them all. Lord Hardwicke granted an injunction to restrain the waste. The lease in the case was made without impeachment of waste. Mr. Greenleaf in his Cruise on Real Property (volume 1, p. 129), lays down the rule thus: "The clause without impeachment of waste, is, however, so far restrained in equity that it does not enable a tenant for life to commit malicious waste so as to destroy the estate which is called 'equitable waste,' for in that case the court of chancery will not only stop him by injunction, but will also order him to repair if possible the damage he has done." In 10 Bac. Abr. tit. "Waste," p. 469, it is said: "So, where a lease was made by a bishop for twenty-one years without impeachment of waste, of land that had many trees upon it, and the tenant cut down none of the trees until about half a year before the expiration of his term, and then began to fell the trees, the court granted an injunction; for though he might have felled trees every year from the beginning of his term, and then they would have been growing up again gradually, yet it is unreasonable that he should let them grow till towards the end of his term, and then sweep them all away; for, though he had power to commit waste, yet this court will model the exercise of that power," citing Abraham v. Bubb, Freem. Ch. 53. At the common law no prohibition against waste lay against the lessee for life or years deriving his interest from the act of the party. The remedy was confined to those tenants who derived their interest from the act of the law, but the timber cut was, at common law, the property of the owner of the inheritance, and the words in the lease "without impeachment of waste" had the effect of transferring to the lessee the property of the timber. Bowles' Case, 11 Coke, 79; Co. Litt. 220a. The modern remedy in chancery by injunction is

broader than at law, and equity will interpose in many cases, and stay waste where there is no remedy at law. Chancery will interpose when the tenant affects the inheritance in an unreasonable and unconscientious manner, even though the lease be granted without impeachment of waste. 4 Kent. Comm. (13th ed.) 78; Perrot v. Perrot, 3 Atk. 94; Aston v. Aston, 1 Ves. Sr. 264; Vane v. Barnard, 2 Vern. 738; Kane v. Vanderburgh, 1 Johns. Ch. 11. In the case of Kane v. Vanderburgh, supra, it was said: "Chancery goes greater lengths than the courts of law in staying waste. It is a wholesome jurisdiction, to be liberally exercised in the prevention of irreparable injury, and depends on much latitude of discretion in the court." In this State an action on the case for waste is authorized by chapter 271, How. St. This has superseded the common-law remedy, and relieves the tenant from the penal consequences of waste under the Statute of Gloucester, as he now recovers no more than the actual damages which the premises have sustained, while that statute gave by way of penalty the forfeiture of the place wasted, and treble damages; and this harsh rule was adopted by many of the American States by the early statutes. This statute giving a right of action in courts of law for waste does not, however, deprive the court of chancery of jurisdiction in proceedings to restrain threatened waste.

There can be no doubt that the defendant in the present case has much of the character of a tenant in fee, but he cannot destroy the inheritance. He may take the timber for his own use, and do all those acts which a prudent tenant in fee would do. He cannot pull down the buildings to destroy them, or cut and destroy fruit trees, or those planted for ornament and shelter; neither can he be permitted to entirely strip the land of all timber, and convert into lumber, and sell it away from the inheritance. It is not claimed that the timber is being used for betterments on the premises, but it is admitted that the life-tenant is selling for his own gain and profit. The demurrer was properly overruled. The decree of the court below will be affirmed, with costs. The other justices concurred.

CHAPTER XXXIX.

BOUNDARIES.

Boundary on Street.

PRATT v. QUIRK ET AL.

119 Minn. 316, 138 N. W. 38. 1912.

Appeal from District Court, Hennepin County; John H. Steele and Andrew Holt, Judges.

Action by Lydia A. Pratt against Minnie Quirk and others. From an order denying plaintiff's motion for a new trial, plaintiff appeals. Affirmed.

START, C. J. Appeal from an order of the district court of the county of Hennepin denying the plaintiff's motion for a new trial in an action of ejectment for the recovery of land originally embraced within the boundaries of a public highway, 66 feet wide, and known as the Wayzata county road. The cause was tried by the court without a jury. The evidence was sufficient to establish the evidentiary facts following:

Lot 1 in Auditor's subdivision No. 46, of the county of Hennepin, was, on and previous to 1902, owned by plaintiff's husband, since deceased, Rufus L. Pratt. The highway ran from a point 100 feet westerly from the southeast corner northwesterly across the lot. On April 21, 1902, Rufus L. Pratt, by warranty deed, his wife, the plaintiff, joining therein, conveyed a part of lot 1 to the defendant John F. Quirk, which was described as follows: "That part lying south of county road of lot one (1) in Auditor's subdivision No. 46, Hennepin county, Minn., according to the record plat thereof on file and of record in the office of the register of deeds in the county of Hennepin and state of Minnesota." The tract of land so conveyed to John F. Quirk was, on July 13, 1904, duly conveyed to his wife, the defendant Minnie Quirk.

On June 13, 1903, Rufus L. Pratt, by warranty deed, his wife,

the plaintiff, joining therein, conveyed a part of lot 1 to John S. Calder. The part or tract so conveyed was described in metes and bounds, and the call in the description relating to the southerly boundary of the tract conveyed was, so far as here material, in these words: "Thence south at right angles to the northerly line of the Wayzata county road; thence southeasterly along said county road." The tract of land so conveyed to John S. Calder was, on May 20, 1907, conveyed by him to the defendant herein, John Engdahl.

On February 8, 1905, Rufus L. Pratt died intestate. His estate was duly probated, and a decree of distribution made, assigning to his heirs, with other land not here in question, a tract of land described as follows: "Commencing at a point on the west boundary line of lot one (1), Auditor's subdivision No. 46, three hundred thirty-four and $^{95}/_{100}$ feet south of the northwest corner of said lot one (1); thence east at right angles to a point one hundred and thirty-five feet west of the east line of said lot one (1); thence south at right angles to county road; thence northwesterly along north line of county road to west boundary line of said lot one (1); thence north to point of beginning."

On December 20, 1906, the heirs, other than the plaintiff, Lydia A. Pratt, conveyed to her this last described tract, by the identical description and boundaries contained in the decree of distribution; then followed these words: "Meaning to convey the residue of lot one (1) not conveyed by Rufus L. Pratt during his lifetime." The plaintiff, on March 14, 1907, conveyed this tract to William E. Stevens by deed containing the same description and boundaries as those in the deed from the heirs to her. Thereafter William E. Stevens conveyed the same tract to Minnie Quirk, one of the defendants herein. The highway in question was duly vacated in November, 1908.

The trial court, upon a consideration of the evidence, found as a fact that the allegations of the complaint as to the land therein described by the plaintiff had not been proven, and as a conclusion of law therefrom that plaintiff take nothing by her action.

[1] It is the contention of the appellant that the finding and decision of the trial court are not sustained by the evidence and are contrary to law. This involves the question of the construction of the several deeds herein referred to, and whether the

court erred in excluding oral evidence of the alleged intention of the parties to the deeds.

[2] The general rule applicable to the question is this: If a deed bounds the land upon a street or highway, title passes to the center thereof, subject to the public easement, if there be nothing in the deed, or the location of the land, or the relation of the parties showing a different intention; but where a deed expressly makes the nearer external line of the highway or street the boundary line of the tract conveyed, and no other language is used indicating a contrary intention, no title to the street passes to the grantee. So construing the description in the deed from Pratt and wife to Quirk, it is clear that the deed conveyed the fee to the southerly half of the highway subject to the public easement, for the tract conveyed was the part of the lot lying south of the highway. The part so conveyed abutted on the highway, which was necessarily the northerly boundary thereof. In like manner the deed from Pratt and wife to Calder, through which the defendant Engdahl claims, bounds the tract conveyed by the highway, and the deed conveyed the fee to the center of the highway upon which the tract conveyed abutted. It is true that the line runs to the northerly line of the highway; but the highway, and not its northerly line, is expressly made the boundary of the land conveyed. See Kneeland v. Van Valkenburgh, 46 Wis. 434, 1 N. W. 63, 32 Am. Rep. 719.

This leaves for consideration only the northerly half of so much of the highway, upon which the tract, conveyed by the plaintiff to Stevens and by him to defendant Minnie Quirk, abutted. The record shows that the plaintiff on the trial attempted to show her title thereto by introducing in evidence the decree of distribution, the deed of the heirs to her, and the deed to Stevens. It may be conceded, for the purposes of this appeal, that none of the deeds conveyed the fee of the land to the center of the highway upon which the tract abutted; but if the fee to the center of the highway was excluded from the boundaries described in the deeds, so also was it from the decree of distribution, for the boundaries were identical in all of the instruments.

The plaintiff, to avoid this conclusion, relies upon the words in the deed from the heirs to her, "meaning to convey the residue of lot one (1) not conveyed by Rufus L. Pratt during his life-

time." These words cannot be fairly construed as conveying any land in addition to that described in the deed, which does not purport by its terms to convey any other land except that therein described. The added words were evidently inserted for the purpose only of identifying the premises conveyed, if perchance there was any uncertainty in any of the calls in the description of the land.

The case of Sanders v. Townshend, 89 N. Y. 623, cited by plaintiff, is not here in point, for the reason that the deed in that case conveyed by number a large number of lots in Harlem Commons, "and also all other lands contained within the limits of said commons * * * not heretofore conveyed by the parties of the first part." It was correctly held that two such lots not designated by numbers were conveyed by the deed.

We hold that the findings and decision of the trial court are sustained by the evidence, and are not contrary to law.

The plaintiff further urges that the trial court erred in excluding evidence of the subsequent acts and conduct of the parties to the deed, for the reason that the deeds were ambiguous. An examination of the record satisfies us that the trial court did not err in excluding the evidence.

Order affirmed.

CHAPTER XL.

FENCES.

Nature of Obligation.

MOTT v. PALMER.

(See page 594.)

MULLEN v. RENZLEMAN.

31 Okla. 53, 119 Pac. 641. 1911.

Error from District Court, Carter County; S. H. Russell, Judge.

Action by F. Renzleman against J. S. Mullen. Judgment for plaintiff, and defendant brings error. Affirmed.

HAYES, J. Defendant in error originally instituted this action by filing in the United States Court for the Southern District of the Indian Territory, at Ardmore, his petition to recover from plaintiff in error damages in the sum of $365, for alleged injuries received by his stock from a fence constructed by plaintiff in error. Upon the admission of the state, the cause was transferred, under the provisions of the enabling act and the schedule to the Constitution, to the district court of Carter county, where a trial to a jury was had, and judgment rendered in favor of defendant in error for his damages, which the jury found to be $162.50. The trial in the court below occurred on May 10, 1909.

[1] Plaintiff in error contends, first, that the district court was without jurisdiction to try the cause, because of the provision of section 1978, Comp. Laws 1909, which confers upon the county courts exclusive original jurisdiction in civil cases, where the amount in controversy is in excess of $200, but does not exceed $500. But this statute has no application to causes pending at the time of its passage and approval. Rudolph v. Jurgensen et al., 119 Pac. 640, decided at this term, but not yet

officially reported; Adair v. McFarlin et al., 29 Okl. 633, 115 Pac. 787.

Defendant in error alleges in his amended petition below that plaintiff in error, in the year 1906, unlawfully, wrongfully, tortiously, and carelessly erected around a certain body of land a fence; that the fence consisted of a single barbed wire, supported by posts 60 or 70 feet apart; that the wire, being about 4 feet from the ground, sagged between the posts so close to the ground that it was not likely to be seen by the live stock; that the holes were dug at the shallow depth of from 8 to 10 inches; that the posts were placed in the holes without the dirt being packed or pressed around them, so as to make them upright and stationary; that they were left loose, so they could sag from 1 to 3 feet; that the wire was not securely or permanently tacked or nailed to the posts; that the fence as thus constructed was left in an unsafe and dangerous condition, so that it constituted a trap for passing live stock. He then alleges that on account of such negligent construction of the fence several of his domestic animals, describing them, became entangled in the barbed wire of the fence, and were cut and bruised, and some were killed, all to his damage, as itemized in his petition. There was a demurrer by plaintiff in error to defendant in error's petition, and to the evidence, the overruling of which has been made the grounds of the second and sixth assignments of error, which may be considered together.

[2] Under the general rule of the common law of England, the owner of the land was under no duty to fence his land against the cattle of his neighbor, and the owner of such stock was bound to keep them within his own inclosure; but this rule of the common law was not in force in the Indian Territory, and the owner of stock in that jurisdiction had the right to let them run at large. Perry v. Cobb, 4 Ind. T. 717, 76 S. W. 289; Eddy et al. v. Evans, 58 Fed. 151, 7 C. C. A. 129. It is earnestly contended by counsel for plaintiff in error that the construction of the barbed wire fence by plaintiff in error does not constitute negligence per se. No fault can be found with this contention, when, as in this case, there is no law prohibiting the construction of such fence; for the contention is supported by many authorities. Robertson v. Wooley, 5 Tex. Civ. App. 237, 23 S. W. 828; Worthington v. Wade et al., 82 Tex. 26, 17 S. W. 520; Galveston Land & Imp. Co. v. Levy et al., 10 Tex. Civ. App. 104, 30 S. W.

504; vol. 1, Thompson on Negligence, c. 961. But it does not follow that if such a fence be constructed in a negligent manner, and in consequence of the negligent construction injury results to a person or his animals, without negligence on his part, the owner of the fence will not be liable for damages. The only negligence with which defendant in error is charged is permitting his stock to run at large where they might come in contact with plaintiff in error's fence; but in states where the owner of stock may, under the law, permit them to run at large upon uninclosed lands the landowners have no right to erect barbed-wire fences thereon in such a manner as to become in the nature of a trap for the destruction of straying animals. Thompson on Neg. vol. 1, c. 956. A leading case upon this question is Hurd v. Lacy, 93 Ala. 427, 9 South. 378, 30 Am. St. Rep. 61, in which Walker, J., speaking for the court, said:

"Upon this subject, the rule prevailing here is very different from the old common-law rule. The result is to work a corresponding change in the liability of the landowner. It follows, therefore, that where the general law of this state prevails a person's right to the use of his land is, in a measure, affected by the recognized right of others to allow their stock to run at large. This latter right would be practically destroyed if upon the lands, not inclosed by a lawful fence, erections or excavations could with impunity be so made that animals straying thereon would be exposed to injury or destruction. It seems plain, under our law, that the landowner has no right to expose straying stock to such perils. He may be under no duty to guard them from the dangers to which they may be exposed in consequence of the natural features of the land, such as ditches, holes, decayed trees liable to fall, etc. Nor would he be liable for an injury to an animal, caused by a fence built in the usual way. If, however, a fence or other erection is so negligently maintained on the land as to be in effect a trap to passing animals, if the injury to animals is the natural or probable consequence of the act, and such as any prudent man must have foreseen, then, in the event of such injury, the landowner is liable to damages therefor."

Other cases in point are Sisk v. Crump, 112 Ind. 504, 14 N. E. 381, 2 Am. St. Rep. 213; McFarland v. Swihart, 11 Ind. App. 175, 38 N. E. 483, 54 Am. St. Rep. 499; Lowe v. Guard et al., 11

Ind. App. 472, 39 N. E. 428, 54 Am. St. Rep. 511; Brown v. Cooper, 10 Tex. Civ. App. 512, 31 S. W. 316; Rowland v. Baird, 18 Abb. N. C. (N. Y.) 256; Loveland v. Gardner, 79 Cal. 317, 21 Pac. 766, 4 L. R. A. 395. This question involves the application of the maxim that the owner of property shall so use it as not to injure the property of another. It is not so applied, however, that the owner of land is deprived of its ordinary use, but, where in the use of it he so negligently constructs a fence that injury to stock of another, who had the right to permit them to run about the commons, results therefrom, and the injury is such that a man of ordinary prudence, under the circumstances, would have foreseen it, the injury is an actionable wrong.

In the Alabama case, a single barbed wire, 4 feet from the ground was loosely hung from the posts 20 or 40 feet apart, and sagged between the posts from 8 to 12 inches, and the fence was around a vacant lot in town. Appellee's mule, while running at large, came in contact with the wire, and was injured. The appellate court sustained the finding of the trial court that the fence was not constructed as an ordinarily prudent husbandman constructs such a fence; and that it was constructed carelessly and negligently and dangerously, without regard to the rights of stock owners and the public.

In the California case, supra, the posts were 36 feet apart, with 3 strands of wire upon them, the first of which was 24 inches above the ground; the second 13 inches above the first; the third 15 inches above the second. The wires were not properly stretched, but left hanging loose between the posts. It was held that whether there was negligence was properly a question for the jury.

[3] There is evidence in the instant case tending to show that the posts were from 90 to 120 feet apart; that there were 2 wires; that the bottom wire was hung on the posts 2 feet above the ground, and sagged between the posts to within 1 foot of the ground. The second and top wire was about 2 feet above the first. The fence extended partly over prairie land and partly through timber. In the timber no fence row was cut, and no posts set up, but the wire was attached to bushes and trees, wherever they were accessible. In some places the wire could not be easily seen for the brush or timber, and was loosely hung all around the tract of land inclosed. From this evidence the

jury might easily conclude that the fence was so constructed as to constitute a warning to stock; and that the dangerous wire hanging so loosely upon the posts and so near to the ground, while not sufficient to warn stock that an obstruction was before them over which they could not pass in safety, constituted a trap in which stock, trying to pass over it, would easily be caught and injured; and we think no error was committed in sending the case to the jury upon the question whether the fence was negligently constructed.

By the third and fifth assignments, complaint is made of the admission of testimony, and by the fourth assignment of the rejection of testimony offered by plaintiff in error. But counsel has failed to set out in his brief in full the substance of the testimony admitted and rejected, of which he complains, as required by rule 25 (20 Okl. xii, 95 Pac. viii), and these assignments therefore will not be considered. For failure to comply with the same rule, by setting out in his brief instructions requested and refused, assignments 8 and 9 cannot be considered. All other assignments made have either been covered in the assignments hereinbefore considered, or are so clearly without merit as not to require discussion.

The judgment of the trial court is affirmed.

PART III

USE AND ENJOYMENT OF LAND OF ANOTHER

CHAPTER XLI.

NATURAL RIGHTS TO AIR AND WATER.

Noise and Dirt.

GOSE v. CORYELL.

126 S. W. 1164 (Tex.).

(Court of Civil Appeals of Texas. March 9, 1910. Rehearing Denied April 6, 1910.)

Appeal from District Court, San Saba County; Clarence Martin, Judge.

Action by T. A. Gose against R. R. Coryell. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

T. A. Gose instituted this suit against R. R. Coryell for the purpose of enjoining and preventing the operation of a cotton gin. The plaintiff alleged that great quantities of noise, dust, and lint emanating from the gin invaded his home, which is nearby the gin, and caused such discomfort and injury to himself and family as rendered the operation of the gin where it is located a nuisance. The defendant's answer embraced a general demurrer, a general denial, and a special plea of limitation or prescription. The case was submitted to the court without a jury, and, from a judgment for the defendant, the plaintiff has appealed.

The trial judge filed conclusions of fact and law, which found in part that the defendant's cotton gin had been operated continuously since 1885 and had been improved materially and rendered less objectionable from time to time; that the plaintiff's house was built in 1905.

KEY, C. J. (after stating the facts as above). There is one assignment of error which complains of the action of the trial court in allowing appellee, over appellant's objection, to prove the value of his property. While authorities may be found which hold otherwise, others, resting upon sounder reason, hold such testimony admissible. The right to relief by injunction against a nuisance is not an absolute right, but one resting in the sound discretion of the court; and for that reason, and in order that such discretion may be wisely and justly exercised when it is sought to prevent an owner of property from using it in a lawful manner on account of injury alleged to result from such use to an adjoining proprietor, we think it is eminently proper to consider the amount of capital which the defendant has invested in the plant or thing complained of.

By and under the other specifications of error, it is urged that, as the trial court found that the operation of the gin constituted a nuisance, judgment should have been rendered awarding the plaintiff relief by injunction. And the further contention is made that the reasons assigned by the trial judge for refusing such relief embody mistaken views of the law. Though in one place in his conclusions of law the trial judge states that appellant is estopped, that statement seems to be incidental to, if not a part of, the conclusion of law which holds that the doctrine of prescription is applicable and bars appellant's right to any relief. At any rate, neither the findings of fact nor the testimony show the existence of one fact essential to constitute an estoppel in pais. In order to constitute such an estoppel, it must be shown that the matters claimed to constitute an estoppel have, in some material respect, influenced the conduct of the party invoking the estoppel. In this case it is not known that the silence and failure to protest on the part of appellant and those under whom he claims caused appellee or his vendors to pursue the course which was pursued by them. While there is much confusion and some conflict of authority upon the subject, we are of opinion that prescription is not available as a defense in this case. Treating the subject of prescription when invoked in behalf of the right to maintain a nuisance, a standard law writer says: "There is a distinction between a prescriptive right to do some act upon one's own premises that operates injuriously to another, and a right to do some act upon another's premises. In the lat-

ter case, each act of user, before the user ripens into a right, is a trespass, for which an action may be maintained at any time, while in the former no action can be maintained until some right has been invaded. In the one case there is an actual invasion of the property itself, while in the other there is a mere invasion of some right. Therefore it will be seen, that while in the one case proof of the adverse user for the requisite period may be comparatively easy, in the other it is always attended with great difficulty, and in some instances might be actually incapable of proof. The rule is, and it is important to be remembered, in view of the doctrines that will be announced hereafter, that, to constitute an adverse user requisite to sustain the right, it must be shown that the user had actually invaded the right of the person against whom the claim is made, in reference to the particular matter which is the subject of complaint, and that the user, during the entire statutory period, and the invasion of the right, has produced an injury equal to, and of the character complained of, and of such a character and to such an extent that at any time during that period an action might have been maintained therefor." 2 Wood on Nuisances, § 708.

In the case at bar, the acts and things alleged to constitute prescription were not done upon appellant's premises, and, until he established his home and placed his family upon those premises, he sustained no injury, unless it was a depreciation in the value of his lots. For these reasons we hold that the doctrine of prescription is not available as a defense; but, at the same time, we are of opinion that the facts and circumstances relied on as constituting prescription, as well as those bearing upon the question of estoppel, are pertinent and proper to be considered in determining whether or not, in the exercise of sound discretion, relief by injunction should be granted.

In Rainey v. R. R. T. & S. Ry. Co., 99 Tex. 276, 89 S. W. 768, 90 S. W. 1096, 3 L. R. A. (N. S.) 593, 122 Am. St. Rep. 622, an injunction was sought to prevent the railway company from maintaining its yards, coal bins, roundhouses, machine shops, etc., in close proximity to the plaintiff's residence. That was a nuisance case, and the jury having returned a verdict which the Supreme Court treated as equivalent to a finding that the matters complained of constituted a nuisance, that court reversed the judgment of the trial court in favor of the defendant. On the

authority of that case, we have reached the conclusion that it is our duty to reverse this case, and, as was done in that case, remand the cause for another trial. We are not unmindful of the general rule that, when there is a special verdict or findings of fact filed by the judge, and no error has been committed other than rendering judgment for the wrong party, the appellate court, when it reverses a case, will render the judgment which should have been rendered. That course was not pursued in the case just cited, and it will not be pursued in this case, because the judge's conclusions of law indicate that, if he had not fallen into error as to prescription, he would not have granted all the relief sought, and it is not shown how much relief he would have granted. Furthermore, it is highly probable that additional testimony can be produced for the purpose of aiding the court in determining whether or not any relief by injunction should be granted. And still furthermore, the court made no finding as to the reasonableness of appellee's conduct in doing the things complained of—which is an important issue in the case.

For the guidance of the court below, we deem it proper to give expression to our views, in a general way, in cases of this class. The courts are practically unanimous upon the proposition that persons who live in cities, towns, or villages must of necessity submit to the consequences resulting from the occupations and pursuits carried on in the immediate neighborhood which are lawful and necessary for trade and commerce, and matters which, although in themselves annoying, are in the nature of ordinary incidents of city or town life, cannot be abated as nuisances. It has also been frequently declared that one who uses his property in a lawful and proper manner is not guilty of a nuisance, merely because the particular use which he chooses to make of it may cause inconvenience or annoyance to a neighbor. But the lawfulness of the act, use, or business is not the sole test, and that which is not otherwise unlawful may constitute a nuisance by reason of the surrounding circumstances and the result which it produces. Also, while authorities may be found tending to the contrary, the better considered cases and the weight of authority are to the effect that in cases of this kind locality is to be considered in determining whether there is a nuisance, and, if so, whether relief should be awarded by injunction, or the injured party restricted to an action for dam-

ages; for what might constitute a nuisance in one locality might not be so in another. It has been held that a business which might be proper in a business or manufacturing neighborhood may be a nuisance when conducted in a residential district; and, on the other hand, a business, which with its incidents might well be considered a nuisance in a residential section of a city or village, may not be subject to such complaint where conducted in a business or manufacturing locality. 29 Cyc. 1157, 1159.

The valuable authority just cited states this as a correct rule: "A fair test as to whether a business lawful in itself, or a particular use of property, constitutes a nuisance, is the reasonableness or unreasonableness of conducting the business or making the use of the property complained of in the particular locality and in the manner and under the circumstances of the case, and, where the use made of his property by the person complained of is not unreasonable, it will not as a rule be enjoined, nor can a person complaining thereof recover damages. But when it is established that a person is creating a nuisance, the mere fact that he is doing what is reasonable from his point of view constitutes no defense."

Our own Supreme Court, in G., C. & S. F. Ry. Co. v. Oakes, 94 Tex. 155, 58 S. W. 999, 52 L. R. A. 293, 86 Am. St. Rep. 835, in a strong and well-considered opinion by Mr. Justice Williams, dealt with the perplexing problem of the relative rights of adjacent owners to use their respective premises in a lawful manner, and whether or not in so doing one owner might become liable for damages to the other. In that case the defendant had planted Bermuda grass on its right of way, and, without negligence on the defendant's part, the grass in a natural way had spread onto and injured the plaintiff's land. The Supreme Court held that, if the defendant was not guilty of negligence, the plaintiff had no cause of action; and, in the course of the opinion, it was said:

"It is a general principle of law that the owner of property may use it as he chooses, in any lawful way; but another maxim, in general terms, requires him to so use it as not to injure another. The application of these principles gives rise to some of the most difficult questions and delicate distinctions known to the law. Bishop concisely states the general doctrine thus: 'One may not, either voluntarily or negligently, cast earth or other

substance from his own ground on a neighbor's or upon his own bring or erect anything, or change the natural position of anything, from which the air, the moving water, or any other force of nature will bear to another on other land what is distinctly injurious to him, or, by any excavation, structure, or other change of his premises from their natural condition, render them unsafe to other persons and their property lawfully thereon; while yet these restraints will not be drawn so closely as substantially to deprive him of the use of his lands, or the ordinary pursuit of his own interests, or to render him answerable for the inevitable accidents injuring others.' Non-Con. Law, § 829.

"Since the owner may use his land as he chooses, if he does not violate any law, and is not to be substantially deprived of its use or of the ordinary pursuit of his own interests, but at the same time is required in its use to avoid injury to another, it at once follows that he may be required to forego a particular use when it is not essential to the substantial enjoyment of his property and is fraught with unreasonable loss to his neighbor. On the other hand, the particular use may be so important to the owner and the loss or inconvenience to his neighbor so slight, compared to his, were he forbidden to so employ his property, that it would be unreasonable and unjust to impose such a restriction. In such cases it is evident that all of the circumstances of the situation must be taken into consideration, the importance of the use to the owner as well as the extent of the damage to be inflicted upon his neighbor, and the rights of the parties are to be adjusted in a practical way; the question being whether or not the proposed use is a reasonable one under all the circumstances. 1 Wood on Nuisances, 3; Bishop on Non-Con. Law, §§ 418, 842. We are unable to discover that the law does, or, from the nature of the subject, can, furnish a more definite rule. For this reason, we think it cannot be laid down as a rule of law applicable to all circumstances and situations that one who plants Bermuda grass upon his premises makes himself liable for any damage that may result to his neighbor; nor, on other hand, that he may not be liable under some circumstances and conditions. As is said in some of the authorities, there must in such inquiries, where rights and interest seem to conflict, be a balancing of them."

Though not specifically so designated by our Supreme Court,

that was a nuisance case, and is so treated by the editors of the American State Reports, as shown by the syllabus under which it is reported in volume 86, p. 835. And in Rainey v. Railway Co., supra, the same court, in recognizing the doctrine that injunction is not an absolute remedy for a nuisance, said: "So that in any case, when the company is enabled to show a reasonable necessity for the location at the particular point, or that no other eligible place can be found where a similar injury would not be inflicted upon another person, or persons, an injunction should be denied and the party remitted to his action for damages. So if the injury be small and capable of being estimated in money, and a money payment is an adequate compensation, and the injunction would operate oppressively to the defendant, then it may be that it would be proper to refuse to enjoin. See remarks of Lord Justice A. L. Smith in Shelfer v. Electric Light Company (1895) 1 Chan. pp. 321-323. However, we would not be understood as laying down any fixed rules upon this point, but as merely throwing out some suggestions which may be useful in the final determination of the rights of the parties." See, also, Joyce on Injunctions, § 1067; Richard's Appeal, 57 Pa. 105, 98 Am. Dec. 202; Huckenstine's Appeal, 70 Pa. 102, 10 Am. Rep. 669; Ballentine v. Webb, 84 Mich. 38, 47 N. W. 485, 13 L. R. A. 321; Gilbert v. Showerman, 23 Mich. 448.

The case last cited is quite similar to the one in hand, except that it was therein sought to prevent the establishment and maintenance of a new business installed after the complainant and his family became residents of his adjoining property. The luminous opinion in that case was written by Judge Cooley, and we quote its conclusion, as follows: "We cannot shut our eyes to the obvious truth that, if the running of this mill can be enjoined, almost any manufactory in any of our cities can be enjoined upon similar reasons. Some resident must be incommoded or annoyed by almost any of them. In the heaviest business quarters, and among the most offensive trades of every city, will be found persons who, from motives of convenience, economy, or necessity, have taken up there their abode; but, in the administration of equitable police, the greater and more general interests must be regarded, rather than the inferior and special. The welfare of community cannot be otherwise subserved and its necesssities provided for. Minor inconveniences

must be remedied by actions for the recovery of damages, rather than by the severe process of injunction. On the whole case, we are of opinion that the complainant, having taken up his residence in a portion of the city mainly appropriated to business purposes, cannot complain of the establishment of any new business near him, provided such new business is not in itself objectionable as compared with those already established, and is carried on in a proper manner. We do not find from the evidence that the business of defendants was thus objectionable, or that in the manner of conducting it there is special ground of complaint. And the decree dismissing the bill must therefore be affirmed, with costs. But the dismissal is to be without prejudice to any proceeding the complainant may be advised to take at law."

And in the very recent case of G., H. & S. A. Ry. Co. v. De Groff, 118 S. W. 138, 21 L. R. A. (N. S.) 749, our Supreme Court said: "The question of issuing an injunction, under such state of facts, depends upon the circumstances, and it is the duty of the court to consider the relative injury to the plaintiffs by a continuance of the nuisance to that which would be inflicted upon the defendant and the public by granting and enforcing an injunction, and, if the injury to the plaintiffs appears to be greatly less in amount in comparison to that which will result to the railroad company and the public, then it is the duty of the court to deny the writ of injunction. Wees v. Coal & Iron Co., 54 W. Va. 430, 46 S. E. 166; Sheldon v. Rockwell, 9 Wis. 166, 76 Am. Dec. 265."

While the right of habitation is one of great importance, and while the law should and does afford all reasonable protection to the home, still these high considerations do not, in all instances, override all others. Cotton is one of the most important products of this state, and cotton gins are absolutely essential to the welfare of that industry, and it cannot be a sound rule of public policy nor a just rule of law which would outlaw them or require their owners, no matter how much care may have been exercised and expense incurred in locating them, to move them elsewhere, merely because they result in some annoyance or discomfort to a family which has taken up its residence on adjacent property long after such gins have been located.

In the recent case of Sherman Gas & Electric Co. v. Belden

(Sup.) 123 S. W. 119, which was a suit for damages only, and not an effort to restrain the operation of the plant, our Supreme Court held, in effect, that the matters complained of did not constitute a nuisance merely because they annoyed the plaintiff in that case, and that the true test was whether or not they were such as would materially annoy and disturb persons of ordinary sensibilities, tastes, and habits. But in this case, where the severe remedy of injunction is sought, such relief should not be granted unless, in addition to the proof ordinarily necessary to establish the existence of a nuisance, it is made to appear that, in maintaining his gin at its present location, the defendant is acting unreasonably; and the question of the reasonableness of his conduct is a question of fact to be determined from all the testimony, including that heard on the former trial, and any other which may tend to show the expense or loss of abandoning the gin or removing it to some other locality free from similar objections by adjacent owners, and whether or not such other locality can be had at all.

We also deem it proper to say, by way of suggestion, that, if the case is tried with a jury, it would seem to be eminently proper to submit it upon special issues, and, after the facts are found, the court can then determine what would be the proper judgment to render.

The judgment is reversed, and the cause remanded.

Right to Cut Ice.

HUNTINGTON v. ASHER.

96 N. Y. 604. 1884.

In this case one Hogan owned a tract of land, about seventeen acres of which were overflowed by a pond made by a dam on a stream. Hogan sold to J. H. Asher, in 1869, half an acre of his land adjoining the pond, by a deed containing the following clauses: "And the party of the first part, as incident to this conveyance, also grants and conveys to the party of the second part, his heirs and assigns, the exclusive right to take ice from the pond of the party of the first part, with the right and privilege of access for that purpose to and from the pond to the ice-house to be erected on the lot hereby conveyed. In considera-

tion of which said grant, as aforesaid, the party of the second part hereby covenants and agrees for himself and his heirs and assigns to furnish and deliver to the party of the first part (so long as he shall continue to occupy his present residence), free of charge, all the ice which he shall require for his own family use, and also to furnish and deliver to the purchaser or purchasers of the pond and mill privilege and their heirs and assigns, free of charge, all the ice which they shall require for their own family use, so long as they continue to reside in the village of Rheinbeck." J. H. Asher erected an ice-house on the parcel conveyed, cut ice from the pond, and stored it in the ice-house. In 1870, Hogan conveyed the land on which the pond was situate to William Kelly, from whom, through a mesne conveyance, it came to the plaintiff; all the deeds conveying this land recited that the conveyance was subject to J. H. Asher's right of taking ice from the pond. In 1878 J. H. Asher conveyed his parcel, with its appurtenances, to the defendant, but making no special mention of any right to cut ice. The Court of Appeals of New York held that the right to cut ice was appurtenant to the defendant's parcel, and could be exercised by her.

CHAPTER XLII.

LATERAL AND SUBJACENT SUPPORT.

Lateral Support.

MOELLERING v. EVANS.

121 Ind. 195, 22 N. E. 989. 1889.

Appeal from circuit court, Allen county; E. O'Rourke, Judge.

Action by Edwin Evans against William Moellering for damages for removing the lateral support to plaintiff's land. Judgment for plaintiff. Defendant appeals.

OLDS, J. This is an action by the appellee against the appellant for damages caused to certain lots owned by the appellee by reason of the excavation of the lands adjacent thereto by the appellant, permitting appellee's lots to cave, and causing the destruction of his fences and barn upon the lots, and greatly depreciating the value of the lots. Issue was joined on the complaint by general denial, and a trial had, resulting in a verdict and judgment in favor of appellee against the appellant for $300. There was a motion for new trial by the appellant overruled, and exceptions, and the ruling is assigned as error.

The first error presented and discussed is sustaining an objection to a question propounded to appellee while testifying as a witness in his own behalf. The appellee was recalled as a witness, and was asked on examination in chief, and testified, as to date he had sold one of the lots, that he sold it in October, 1886, and that the principal part of the earth which had caved or slipped off from the lot had slipped off before he sold the lot; that a large quantity of the dirt right under the stable dropped off or fell off. During the course of the cross-examination the counsel for appellant put the following question to the witness: "Don't you know that could be filled in there for 25 cents a yard?" There was an objection to the question, and the objec-

tion sustained, and exceptions taken at the time. There was no error in this ruling. The witness was recalled to fix the date of the sale of the lot, and to testify as to whether the injury to the lot had occurred before or after the sale. The witness had not testified on such examination as to the amount of earth which had slid off prior to the sale, nor as to the amount of the damage done. The witness had been upon the witness stand, and been examined in chief, and fully cross-examined, and was recalled to testify to those particular facts, and it was proper to limit the cross-examination to the particular matter testified to by the witness when recalled and the question propounded did not relate to and was not germane to the matter of which the witness spoke in his examination in chief.

The next question discussed is the giving and refusal of instructions by the court. The court gave the following instructions:

"(1) There is incident to land, in its natural condition, a right to support from the adjoining land; and if land not subject to artificial pressure sinks or falls away, in consequence of the removal of such support, the owner is entitled to damages to the extent of the injury sustained. The measurement of damages in such case is not the cost of restoring the land to its former condition or situation, or of building a wall to support it, but it is the diminution in value of the plaintiff's land by reason of the acts of the party removing the support. (2) If you find from the evidence that the defendant in this case removed land adjoining plaintiff's in the manner charged in the complaint, then the measure of damages would be the diminution in value of plaintiff's land. (3) If you find from the evidence that the defendant in this case removed land adjoining plaintiff's, as charged in the complaint, and as a result of such removal the fences and buildings on plaintiff's land were destroyed or injured, in estimating the damages you may consider such injury to the fences and buildings on plaintiff's premises, if any." Instructions 1 and 2 given by the court properly stated the law as to the measure of damages to the lots. It is an old and true maxim that every one must so enjoy his property as not to injure the property of another, and this was interpreted in the case of Taylor v. Fickas, 64 Ind. 167, to mean "that every one must so enjoy his property, according to his

legal right, as not to injure the legal right in the property of another." The lot-owner has the legal right to the support to his lot from the adjoining land. If such support be removed, and by reason of such removal the lot caves, and is injured, by reason of which the lot-owner suffers damages, he has a right of action against the person removing the support for the amount of the damages sustained to the land. The measure of damages is the diminution in the value of the lot or land. That is a matter easily arrived at—the difference in the value of the lot by reason of the injury. Thus the damages sustained may be arrived at with reasonable certainty and without complication.

To pursue any other course to arrive at the damage we enter a field of uncertainty, involving the cost of labor and material to supply the support removed, the manner of its construction, its sufficiency and durability, and when completed we have a different support, or a support of different material, and an artificial instead of a natural one. Sutherland on Damages states the law as follows (volume 3, pp. 417, 418): "There is incident to the land, in its natural condition, a right of support from the adjoining land; and if land not subject to artificial pressure sinks and falls away, in consequence of the removal of such support, the owner is entitled to damages to the extent of the injury sustained. The measure of damages is not the cost of restoring the lot to its former situation, or building a wall to support it, but it is the diminution of value of the plaintiff's lot by reason of the defendant's act." McGuire v. Grant, 25 N. J. Law, 356. Instructions 1 and 2 properly stated the measure of damages, but instruction 3 is erroneous. It tells the jury, as we interpret it, that if the defendant removed the lateral support he would be liable to the plaintiff for the damages resulting to the buildings thereon, regardless of the manner in which the same was done,—whether the injury was caused by the negligent and careless manner in which the dirt was removed, or whether it was removed in a careful or prudent manner.

It may be claimed that as the complaint charges that the defendant negligently, unskillfully, and carelessly did such work, he caused the sides of the lots to cave and produced the injury, and that as the charge tells the jury that if they find

the defendant removed the soil adjoining plaintiff, as charged in the complaint, and as a result of such removal the fences and buildings were destroyed, the defendant is liable, that the instruction was to the effect that if the injury resulted from the carelessness and negligence of the defendant in removing the lateral support he would be liable; but we do not think the charge warrants this construction. The jury are nowhere told in the instructions as to the nature of the charge in the complaint, or told that there would be any difference in the liability of the defendant whether the earth was removed in a careless and negligent manner, by reason of which negligence the injury resulted, and the liability for the damage to the buildings if the excavation had been made in a careful and prudent manner.

Washburn on Real Property (volume 2, p. 380) states the law as follows: "Of a nature somewhat akin to the easement of light connected with the ownership of a house is that of support, or the right of having one's land, and the structures erected thereon, supported by the land of a neighboring proprietor. The proposition may be stated thus: A, owning a piece of land without any buildings upon it, has a natural right of lateral support for his land from the adjoining land. This right exists independent of grant or prescription, and is also an absolute right; so that if his neighbor excavates the adjoining land, and in consequence A's land falls, he may have an action, although A's excavation was not carelessly or unskillfully performed. This natural right does not extend to any buildings A may place upon his land, and therefore if A builds his house upon the verge of his own land he does not thereby acquire a right to have it derive its support from the land adjoining it until it shall have stood and had the advantage of such support for twenty years. In the meantime such adjacent owner may excavate his own land for such purposes as he sees fit, provided he does not dig carelessly or recklessly; and if in so doing the adjacent earth gives way, and the house falls by reason of the additional weight thereby placed upon the natural soil, the owner of the house is without remedy. It was his own folly to place it there." This doctrine is fully supported by the authorities. Moody v. McClelland, 84 Amer. Dec. 771; Beard v. Murphy, 86 Amer. Dec. 693; Charless v.

Rankin, 66 Amer. Dec. 644, and note, 649; Lasala v. Holbrook, 25 Amer. Dec. 524. The third instruction given by the court was erroneous, and for this error the cause must be reversed. What we have said in regard to the instructions given, shows that the instructions asked for by appellant on the question of damages were erroneous, and were properly refused. Judgment reversed, at costs of appellee, with instructions to sustain the motion for new trial.

CHAPTER XLIII.

EASEMENTS.

License Distinguished From Easement—Easement Less Than Fee.

GOLDMAN v. BEACH FRONT REALTY CO.

83 N. J. L. 97, 83 Atl. 777. 1912.

Appeal from District Court of Atlantic City. Action by Herman I. Goldman against the Beach Front Realty Company. Judgment for plaintiff, and defendant appeals. Affirmed.

PARKER, J. The action is in tort and is based upon the forcible deprivation by the defendant of plaintiff's privilege of using, at certain hours, a portion of the entrance of the business property fronting on the board walk at Atlantic City for the purpose of plaintiff's business of renting rolling chairs. It appears that the corporation, known as Young's Amusement Company, owned a piece of land and building thereon, with an entrance on the board walk where that company operated what is known as a merry-go-round. Under date of June 1, 1911, by instrument under seal, which in its general provisions is in the form of a lease, and very probably was drawn on a printed form of lease or adapted therefrom, the amusement company "did grant, demise, lease, and to farm let" to the plaintiff the "privilege" to use a certain space situate on the board walk, etc., and known as the entrance to the merry-go-round of the Young's Amusement Company "for the renting of rolling chairs, to be occupied only on Sundays and between the time the merry-go-round shall be closed in the evening until 6 o'clock in the morning on week days." Then follow certain restrictions as to the way the rolling chairs ought to be placed; the rent is named as such and fixed at $15 a month, payable in advance on the second day of each month. And it was further agreed that the plaintiff was to have the exclusive privilege of renting the rolling chairs on the premises of the Young's

Amusement Company. Then follow a covenant to pay rent and a covenant not to assign the lease, "or any part thereof," or permit the use thereof for any other purpose than the renting of rolling chairs nor to suffer alterations to be made therein, and for surrender of the lease and a covenant for quiet enjoyment; in short, the operative words of the covenants and conditions are all those of an ordinary lease. The term was to extend until January 2, 1913.

Plaintiff seems to have enjoyed the right or privilege conferred by this instrument so long as the Young's Amusement Company continued to operate the merry-go-round; but during the term that company sold the property and agreed to remove the merry-go-round, and did so, the grantee wishing to conduct another business there, and said grantee notified plaintiff to vacate, and on his refusal to do so there were certain forcible acts which resulted in the entire exclusion of plaintiff from the privileges theretofore enjoyed under the instrument in question. He brought suit for damages in tort, claiming for loss of profits, and was awarded a judgment of $171 for the period between November 16, 1911, and December 4, 1911.

The sole ground of appeal is that the court erred in refusing to nonsuit the plaintiff. Motion to nonsuit was put upon the grounds, first, that the agreement was not a lease in contemplation of law; second, that the removal of the merry-go-round by the grantor of the privilege operated as a cancellation of the agreement; and, third, that "it was not assignable."

The last ground is vague and to us meaningless, because there was no assignment of the plaintiff's privilege, and, if it is meant that the privilege ceased with the conveyance of the fee and the change of use, this point is covered by the second ground. The appellant contends that the agreement did not constitute a lease, but that it conferred only a license, and that this was revocable. It may be conceded that it was not a lease, although, as already noted, it was completely drawn in form as such.

If it was a license, it was properly revocable, unless coupled with an interest (18 Cyc. Law [2d Ed.] 1147; East Jersey Iron Co. v. Wright, 32 N. J. Eq. 248); and in such case there can be no recovery in tort, but only for breach of the contract (Wood v. Leadbitter, 13 M. & W. 838, 16 E. R. C. 49; Shubert v. Amusement Co., 83 Atl. 369, decided at the present term of

this court). The present action being in tort, these rules would apply and would bar a recovery in this case.

We are of opinion, however, that the instrument in question conferred more than a license, and that what was created thereby was an easement. Ordinarily the existence of an easement is predicated upon that of a tract of land subjected thereto, but there is a class of easements or of interests in land akin thereto and called for convenience easements in gross, and which are well recognized in the law. It is plain from an examination of the instrument under seal, constituting the contract between the parties, that the plaintiff was invested with the right (called a privilege) to go upon a certain portion of the land afterwards conveyed to the defendant at certain periods of the twenty-four hours constituting a day and on all of Sunday, and there conduct a certain specified business, such privilege to last for a definite term of about nineteen months.

Ordinarily an easement is a right in fee, but not necessarily so, and that it may be for an estate less than a fee, or even for a term of years, is fully recognized by the Court of Errors and Appeals in Newhoff v. Mayo, 48 N. J. Eq. at page 623, 23 Atl. at page 267, 27 Am. St. Rep. 455, where the court said: "Such a right, while it endures, has every characteristic of an easement, and should be governed by the rules relating to such incorporeal hereditaments." The present case closely resembles Willoughby v. Lawrence, 116 Ill. 11, 4 N. E. 356, 56 Am. Rep. 758, where plaintiffs, in consideration of building a fence around a race track under written contract, were granted the privilege of using the fence for advertising purposes, and, after the sale of the fee, were prevented from so doing, and it was held that they were entitled to enforce their right by injunction.

The remedy for disturbance of an easement is an action on the case (14 Cyc. 1216; Osborne v. Butcher, 26 N. J. Law, 308), and the state of demand, designated in tort, may be properly regarded as a declaration in case.

We cannot see that the discontinuance of the use of the premises for the purposes of a merry-go-round could result in a discontinuance of the easement. The only thing on the face of the written instrument that is uncertain is the hour when the merry-go-round closes at night, and the usual hour of closing could of course be readily ascertained by oral proof.

CHAPTER XLIV.

LICENSES.

License Distinguished From Easement.

GOLDMAN v. BEACH FRONT REALTY CO.

(See page 783.)

Tickets.

WOOD v. LEADBITTER.

13 M. & W. 838 (Eng.). 1845.

ALDERSON, B. This was an action tried before my Brother Rolfe at the sittings after last Trinity term. It was an action for an assault and false imprisonment. The plea (on which alone any question arose) was that at the time of the alleged trespass the plaintiff was in a certain close of Lord Eglintoun, and the defendant, as the servant of Lord Eglintoun, and by his command, laid his hands upon the plaintiff in order to remove him from the said close, using no unnecessary violence. Replication, that, at the time of such removal, the plaintiff was in the said close by the leave and license of Lord Eglintoun. The leave and license was traversed by the defendant, and issue was joined on that traverse. On the trial it appeared that the place from which the plaintiff was removed by the defendant was the enclosure attached to and surrounding the great stand on the Doncaster race-course; that Lord Eglintoun was steward of the races there in the year 1843; that tickets were sold in the town of Doncaster at one guinea each, which were understood to entitle the holders to come into the stand and the enclosure surrounding it, and to remain there every day during the races. These tickets were not signed by Lord Eglintoun, but it must be assumed that they were issued with his privity. It further appeared, that the plaintiff, having purchased one of these tickets, came to the stand during the races of the year 1843,

and was there or in the enclosure while the races were going on, and while there, and during the races, the defendant, by the order of Lord Eglintoun, desired him to depart, and gave him notice that if he did not go away, force would be used to turn him out. It must be assumed that the plaintiff had in no respect misconducted himself, and that, if he had not been required to depart, his coming upon and remaining in the enclosure would have been an act justified by his purchase of the ticket. The plaintiff refused to go, and thereupon the defendant, by order of Lord Eglintoun, forced him out, without returning the guinea, using no unnecessary violence.

My Brother Rolfe, in directing the jury, told them that, even assuming the ticket to have been sold to the plaintiff under the sanction of Lord Eglintoun, still it was lawful for Lord Eglintoun, without returning the guinea, and without assigning any reason for what he did, to order the plaintiff to quit the enclosure, and that if the jury were satisfied that notice was given by Lord Eglintoun to the plaintiff, requiring him to quit the ground, and that, before he was forcibly removed by the defendant, a reasonable time had elapsed, during which he might conveniently have gone away, then the plaintiff was not, at the time of the removal, on the place in question by the leave and license of Lord Eglintoun. On this direction the jury found a verdict for the defendant. In last Michaelmas term, Mr. Jervis obtained a rule nisi to set aside the verdict for misdirection, on the ground that, under the circumstances, Lord Eglintoun must be taken to have given the plaintiff leave to come into and remain in the enclosure during the races; that such leave was not revocable, at all events without returning the guinea; and so that, at the time of the removal, the plaintiff was in the enclosure by the leave and license of Lord Eglintoun. Cause was shown during last term, and the question was argued before my Brothers Parke and Rolfe and myself; and on account of the conflicting authorities cited in the argument, we took time to consider our judgment, which we are now prepared to deliver.

That no incorporeal inheritance affecting land can either be created or transferred otherwise than by deed, is a proposition so well established that it would be mere pedantry to cite authorities in its support. All such inheritances are said emphatically to lie in grant, and not in livery, and to pass by mere delivering

of the deed. In all the authorities and text-books on the subject a deed is always stated or assumed to be indispensably requisite.

And although the older authorities speak of incorporeal inheritances, yet there is no doubt but that the principle does not depend on the quality of interest granted or transferred, but on the nature of the subject matter: a right of common, for instance, which is a profit a prendre, or a right of way, which is an easement, or right in nature of an easement, can no more be granted or conveyed for life or for years without a deed than in fee simple. Now, in the present case, the right claimed by the plaintiff is a right, during a portion of each day, for a limited number of days, to pass into and through and to remain in a certain close belonging to Lord Eglintoun; to go and remain where if he went and remained, he would, but for the ticket, be a trespasser. This is a right affecting land at least as obviously and extensively as a right of way over the land—it is a right of way and something more; and if we had to decide this case on general principles only, and independently of authority, it would appear to us perfectly clear that no such right can be created otherwise than by deed. The plaintiff, however, in this case argues that he is not driven to claim the right in question strictly as grantee. He contends that, without any grant from Lord Eglintoun, he had license from him to be in the close in question at the time when he was turned out, and that such license was, under the circumstances, irrevocable. And for this he relies mainly on four cases, which he considers to be expressly in point for him, viz.: Webb v. Paternoster, reported in five different books, namely, Palmer, 71; Roll. 143 and 152; Noy, 98; Popham, 151, and Godbolt, 282; Wood v. Lake, Sayer, 3; Tayler v. Waters, 7 Taunt. 374; and Wood v. Manley, 11 Ad. & E. 34; 3 Per. & D. 5.

As the argument for the plaintiff rested almost entirely on the authority of these four cases, it is very important to look to them minutely, in order to see the exact points which they severally decided.

Before, however, we proceed to this investigation, it may be convenient to consider the nature of a license and what are its legal incidents. And for this purpose we cannot do better than refer to Lord C. J. Vaughan's elaborate judgment in the case of Thomas v. Sorrell, as it appears in his reports. The question

there was as to the right of the Crown to dispense with certain statutes regulating the sale of wine, and to license the Vintners' Company to do certain acts notwithstanding those statutes.

In the course of his judgment the Chief Justice says, Vaughan, 351: "A dispensation or license properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful which without it had been unlawful. As a license to go beyond the seas, to hunt in a man's park, to come into his house, are only actions which, without license, had been unlawful. But a license to hunt in a man's park and carry away the deer killed to his own use; to cut down a tree in a man's ground, and to carry it away the next day after to his own use —are licenses as to the acts of hunting and cutting down the tree, but as to the carrying away of the deer killed and tree cut down, they are grants. So, to license a man to eat my meat, or to fire the wood in my chimney to warm him by, as to the actions of eating, firing my wood, and warming him, they are licenses; but it is consequent necessarily to those actions that my property may be destroyed in the meat eaten and in the wood burnt. So as in some cases, by consequent and not directly, and as its effect, a dispensation or license may destroy and alter property."

Now, attending to this passage, in conjunction with the title "License" in Brooke's Abridgment, from which, and particularly from paragraph 15, it appears that a license is in its nature revocable, we have before us the whole principle of the law on this subject. A mere license is revocable; but that which is called a license is often something more than a license; it often comprises or is connected with a grant; and then the party who has given it cannot in general revoke it, so as to defeat his grant, to which it was incident.

It may further be observed that a license under seal (provided it be a mere license) is as revocable as a license by parol; and, on the other hand, a license by parol, coupled with a grant, is as irrevocable as a license by deed, provided only that the grant is of a nature capable of being made by parol. But where there is a license by parol coupled with a parol grant, or pretended grant, of something which is incapable of being granted otherwise than by deed, there the license is a mere license; it is not an incident to a valid grant, and it is therefore revocable.

Thus, a license by A to hunt in his park, whether given by deed or by parol, is revocable; it merely renders the act of hunting lawful, which, without the license, would have been unlawful. If the license be as put by Chief Justice Vaughan, a license not only to hunt, but also to take away the deer when killed to his own use, this in truth a grant of the deer, with a license annexed to come on the land; and supposing the grant of the deer to be good, then the license would be irrevocable by the party who had given it; he would be estopped from defeating his own grant, or act in the nature of a grant. But suppose the case of a parol license to come on my lands, and there to make a watercourse to flow on the land of the licensee. In such a case there is no valid grant of the watercourse and the license remains a mere license, and therefore capable of being revoked. On the other hand, if such a license were granted by deed, then the question would be on the construction of the deed, whether it amounted to a grant of the watercourse; and if it did, then the license would be irrevocable. * * *

It was suggested that in the present case a distinction might exist by reason of the plaintiff's having paid a valuable consideration for the privilege of going on the stand. But this fact makes no difference; whether it may give the plaintiff a right of action against those from whom he purchased the ticket, or those who authorized its being issued and sold to him, is a point not necessary to be discussed; any such action would be founded on a breach of contract, and would not be the result of his having acquired by the ticket a right of going upon the stand, in spite of the owner of the soil; and it is sufficient, on this point, to say that in several of the cases we have cited —Hewlins v. Shippam, for instance, and Bryan v. Whistler— the alleged license had been granted for a valuable consideration, but that was not held to make any difference. We do not advert to the cases of Winter v. Brockwell, 8 East, 308, and Liggins v. Inge, 7 Bing. 682, or other cases ranging themselves in the same category, as they were decided on grounds inapplicable to the case now before us, and were, in fact, admitted not to bear upon it.

In conclusion, we have only to say that, acting upon the doctrine relative to licenses, as we find it laid down by Brooke, by Mr. Justice Dodderidge, and by C. J. Vaughan, and sanc-

tioned by Hewlins v. Shippam, and the other modern cases proceeding on the same principle, we have come to the conclusion that the direction given to the jury at the trial was correct, and that this rule must be discharged.

Rule discharged.

Revocation of License.

JOHNSON v. BARTRON.

23 N. D. 629, 137 N. W. 1092. 1912.

Appeal from District Court, McLean county; Winchester, Judge.

Action by James H. Johnson against James Bartron, Jr. Judgment for defendant, and plaintiff appeals. Reversed and remanded, with instructions.

BRUCE, J. (after stating the facts as above). It seems to be perfectly clear from the evidence that there was no conveyance of land from the defendant to the plaintiff's grantor, Hull, or any intention that there should be. It is equally clear, however, that it was the intention of the three parties to the original agreement that each should enjoy the use of the well in common, and that each contributed towards the cost of the construction thereof. The intention of such parties was that the well should be upon the boundary line, and the whole controversy has arisen from a mistake as to where such line was actually located. It is, however, undisputed that at the time of the location of the well it was agreed that the ownership "should remain as it was, regardless of any change in the line." Under the peculiar circumstances of the case, a court of equity should imply a license to pass upon the land of the defendant and to use the well in the plaintiff, but a license which would be revocable upon the payment to the licensees of the money expended by the plaintiff's grantor in the construction of the well, and his half of the interest purchased from Lauback, and half of the reasonable value of the windmill which was erected jointly by the defendant and the plaintiff's grantor. We know that there is a wide divergence among the authorities as to whether a license is revocable at all where the licensee has acted under the authority conferred, and has incurred expense

in the execution of it by making valuable improvements or otherwise. See 25 Cyc. 646-648; notes to Lawrence v. Springer, 31 Am. St. Rep. 702-719, and to Ricker v. Kelly, 10 Am. Dec. 38-45; Washburn on Easements (4th Ed.) 7-18. We believe the better rule to be that, where nothing more than a mere license appears, it is revocable at the will of the licensor, whatever expenditures the licensee may have made, provided the licensee has reasonable notice and opportunity to remove his fixtures and improvements, or, in case of joint ownership, that the licensor compensate him for his one-half of the value thereof. To hold such a license irrevocable would on the one hand be to override the statute of frauds and convert an executed license into an estate in lands, which we believe is going too far. See 25 Cyc. 646-648. To hold, on the other hand, that such a license can be revoked without making compensation or giving opportunity for the removal of the improvements, would, in our opinion, be inequitable.

CHAPTER XLV.

PROFITS.

HALL v. LAWRENCE.

2 R. I. 218. 1852.

In equity. The bill prayed an injunction to restrain the defendant from obstructing or hindering the plaintiff or his tenant, or the servants or agents of such tenant, in passing and repassing over a certain path or drift-way to the shore or beach, and procuring sand, gravel, and seaweed from said shore or beach upon or adjoining the defendant's farm, and stones (below high-water mark) thereon, and tipping sea-weed on the bank of said defendant's farm, as they had the right and had been accustomed to do. The bill further prayed an account of sea-weed taken by the defendant from said shore, and for damages for obstructions to the use of the way aforesaid.

BRAYTON, J., delivered the opinion of the court.

The plaintiff claims in this case a right to enter upon the land of the defendant, being the farm set off to Nicholas Taylor in the deed of partition of 1776, and to take and carry away from the shore thereof, mentioned in the deed of partition, sea-weed, gravel, and stone in any quantity without limit at his will and pleasure, and to make merchandise thereof for his profit, and a right of way to pass and repass to and from said shore over the defendant's land for that purpose.

This right he claims as a right in gross, though, by the deed of partition, he claims that it was originally made appurtenant to the north farm set off in said deed to Joseph W. Taylor, under whom he claims.

The arguments both for the plaintiff and defendant proceed upon the assumption that the right of taking sea-weed, gravel, and stone, whatever it was, was originally appurtenant to the estate of Joseph W. Taylor; and, indeed, if it were not appurtenant, it is evident the plaintiff has no title, for his deed from

Armstrong describes no such right, and unless it was appurtenant at the time, he takes nothing by his deed.

But whether any right of common then remained appurtenant to the nineteen and three quarters acres, must depend upon the effect which is to be given to the conveyance of Joseph W. Taylor to his brother Nicholas, of March 12, 1803. By that deed Joseph conveyed to Nicholas thirty acres, part of the share set off to him, to which the whole right of common was made appurtenant.

The defendant's counsel claims that the effect of the conveyance of the thirty acres portion of the dominant estate is the extinguishment of the whole common.

The first question here raised is whether this right of common was divisible, and might or not be apportioned to the several parts of the dominant estate upon a severance of the estate. In regard to rights of common which by law are indivisible, a conveyance of any portion of the dominant estate will extinguish the whole, as in the case of common of estovers, Van Rensselaer v. Radcliff, 10 Went. 639; Livingston v. Ketcham, 1 Barb. S. C. R. 592; and the reason assigned is that the service is entire and appurtenant to an entire estate, and not being divisible, it cannot be appurtenant to part of the estate as an entire service.

There are, however, other rights of common which are in law divisible; and in all such cases it may be apportioned to the several parts of the dominant estate upon its severance by different conveyances. A right of pasture for cattle sans nombre is of this kind. In such case it is held that though the right be unlimited in terms, yet it is intended for the use of the estate and limited to such cattle as may be kept upon the dominant estate or upon any portion of it, and equally upon any portion, so that upon a division of the dominant estate and upon apportionment of the service to the several parts, the servient estate is not charged to any greater extent than before or with more cattle. And the rule is that wherever the common is admeasurable, the common is apportionable. Tyrringham's Case, 4 Co. 35. But the right, being measured by the uses of the estate, cannot be severed from the estate and granted over. Drury v. Kent, Cro. J. 15.

The right in the present case is of the same nature. It is intended for the use of the estate and for every acre of it, and

that equally; and whether the right be divided or not, the measure is the same. It may therefore be divided, and, by a conveyance of a part of the dominant estate, it would be apportioned to the part conveyed, and so much might well pass with it under the term "appurtenance."

This conveyance may be affected by another rule, for though the common may be in its nature divisible and apportionable, yet, if the effect of the conveyance is to surcharge the servient estate, it shall not only not be apportioned, but shall become extinct for the whole.

And for the same reason it is, that a release of a portion of the servient estate or purchase of part of the servient by the sole owner of the dominant shall extinguish. In Rotherham v. Green, Cro. E. 593, there was a release of part of the land in which, &c. In Kimpton v. Bellamyes, Leonard, 43, the owner of the dominant purchased two acres of forty of the servient estate. In these cases the effect was to surcharge the residue. So, in Tyrringham's Case, 4 Co. 35.

In Wild's Case, 8 Co. 156, there was a conveyance of five acres of the forty contained in the dominant, and on the same reasoning it was held that the servient estate was no more chargeable upon the severance of the dominant estate than before, for that the five acres were entitled to common for the cattle levant and couchant thereon as before, and for no more.

And the rule deducible from all the cases is, as before stated, that if the effect of the conveyance is to surcharge the common, and burden to a greater extent the servient estate, it shall extinguish; if otherwise, there shall be an apportionment, and such portion will pass as appurtenant.

By this rule the portion of common belonging to the thirty acres would become severed from the residue, which would remain appurtenant to the nineteen and three quarters acres retained by Joseph Taylor, and the thirty acres would become a distinct dominant estate.

But inasmuch as the title to the dominant estate, by virtue of the conveyance, became united in the hands of Nicholas with the servient estate, all the common appurtenant to the thirty acres thereby became extinguished by unity of title. It has not been revived by any of the conveyances so as to pass by the term "appurtenance" in the deed of Armstrong to the plaintiff.

The defendant's counsel claims that, although such would be the effect of the deed to a stranger, who immediately conveys to the servient owner, yet, if made directly to the servient owner, the whole is extinguished.

Now, bearing in mind the reasoning on the cases generally upon the subject, and the rules deducible from them, we should not expect to find a case in which it should be held that, where the conveyance does not directly surcharge the common remaining, and where the servient owner can in nowise suffer injury, the whole common should become extinguished, and that against the apparent intent of the parties, but that effect would be given in such case to the clear intent.

There is, however, in Tyrringham's Case, the annunciation of such a rule as the defendant's counsel claims. It is this: that common appurtenant cannot be extinct in part and in esse for part by act of the parties, for that common appurtenant was against common right. Taken in the broad sense which counsel gives it, and independent of the connection in which it is used, it might support the ground which the counsel assumes. But taken with its connection, it is evident that it was not applied, or intended to apply, to such a case as is now before us. The same rule exists in relation to rent-charge, which is said to be against common right as distinguished from rent-service, which is deemed of common right.

The only American case cited upon this point is that of Livingston v. Ten Broeck, 16 Johns. 14; and as this is claimed to conclude this point, it will be necessary to examine it with a little particularity.

The statement of the case shows that a certain estate, called the Vosburg farm, was entitled to common in a large pasture within the manor of Livingston, and that Henry Livingston was sole owner of fifty acres of land, parcel of the tract in which common was to be taken; but as it did not appear whether or not the conveyance to Henry Livingston comprehended a portion of the Vosburg farm, a new trial was necessary, and Mr. Justice Spencer, who delivered the opinion thereupon, says he does not see how the question can now be raised; but, in view of a new trial, it is proper that the court should express an opinion, and he proceeds to give it. He then deduces the general rule, and says the governing principle is, that injustice

shall not be done to the servient estate; and if it shall be found that Henry Livingston purchased part of the Vosburg farm (which was the dominant estate, he being owner of a portion only of the servient), the whole common should be extinguished, because he is then interested in discharging his own land, and surcharging the residue.

There is nothing in the case, or in the opinion delivered, which indicates any intention in the court to go beyond the Case of Tyrringham. The whole opinion is based upon that case, which, as Justice Spencer remarks, was affirmed for good law in Wild's Case, and had never been overruled.

Now Tyrringham's Case, when carefully examined, it will be seen, does not come up to the point made by the defendant's counsel. That was a case involving the same principles as that of Livingston v. Ten Broeck. It was this: Boniface Pickering was the owner of forty acres, part of a tract of seventy acres, which constituted the servient estate (the residue, thirty acres, being owned by one John Pickering). He purchased the whole of the dominant estate. It was resolved "that when part of the land to which, &c., is aliened, then every of them may prescribe to have common for cattle levant and couchant upon the land; and in none of these cases any prejudice accrues to the tenant of the land in which, &c., for he shall not be charged with more upon the matter than before the severance; and God forbid" (say the court) "the law should not be so, when part of the land to which, &c., is aliened, for otherwise, many commons in England would be extinguished and lost." And it was agreed that such common as is admeasurable shall remain after severance of part of the land to which, &c. But inasmuch as the court resolved that the common was appurtenant, and not appendant, and so against common right, it was adjudged that by the said purchase the common was extinct; (and the reason) "for in such case common appurtenant cannot be extinct in part and in esse for part by act of the parties." Now, the case was: the owner of part of the servient became owner of the whole dominant, and so interested in surcharging the residue of the servient.

But, in order fully to understand the case and the point immediately before the court, it must be borne in mind that so far as the severance and apportionment of the common to the

dominant estate is concerned, there is no difference in the rule of law applicable to common appurtenant or common appendant. In either case, upon severance of the dominant estate the common was apportionable. The difference between the two related to the servient estate, and the court in a preceding part of the case had resolved that common appendant, being of common right, might not only be apportioned to the land to which, &c., but would also be apportioned upon the severance of the estate in which, &c.; and they say, that as to this kind of common, if the commoner aliene part the land in which, &c., yet the common shall be apportioned. But it was not so with common appurtenant. In such case there could be no apportionment to the servient estate. And, therefore, the court were obliged to say, referring particularly to the part of the case before them, that by this purchase the common was extinct for the whole, for in such case common appurtenant could not be extinct in part and in esse for part by act of the parties.

There never was any difficulty in releasing a portion of the service charged upon the servient estate. The only difficulty was in releasing any portion of the servient estate wholly from all service, and that, because it could not be apportioned.

The points resolved in Tyrringham's Case might then well be affirmed for good law as they were in Wild's Case, where it is said: "It was well agreed that common appendant was of common right severable; and although the commoner in such case purchase parcel of the land in which, &c., yet the common shall be apportioned; but in such case common appurtenant and not appendant by purchase of parcel of the land in which, &c., is extinct, for the causes and reasons given in Tyrringham's Case;" and as a further reason: "It was folly for the commoner to intermeddle with part of the land in which, &c., which belonged not to him; but when he intermeddled but only with his own land by alienation thereof, it shall not turn to his prejudice, for that it is not against any rule of law, as the other case."

The agreement entered into between Armstrong and Wilbour, July [Feb.] 17, 1835, which was referred to as affecting this right, we do not see has any effect to vary the rights of the parties in this respect. That agreement is intended to create a new right in the contingency that Wilbour should purchase the right of his co-tenants. There was no conveyance of any

lands to which it could be appurtenant by implication, and it is not expressly made appurtenant to any. It must have been when it came in esse a right in gross, and, had it been intended to be appurtenant, it was not in esse at the time of Armstrong's conveyance to the plaintiff, so as to pass by the deed.

Neither can the exception in the covenant of warranty made by Wilbour in his conveyance to the defendant vary those rights. There was a right of common in the estate conveyed, appurtenant to the nineteen and three-quarters acres, and he excepts, —"a right which the owner of the adjoining farm has;" and his exception was equally necessary to his protection, whether the right were appurtenant to the whole farm, or to the smallest portion of it only. It is a recognition of such right to some extent, and is sufficiently answered by the smallest extent.

We are then, upon the whole, of the opinion that the deed from Joseph W. Taylor to Nicholas Taylor of the thirty acres operated as a severance and apportionment of the common, and that the part apportioned to the thirty acres became extinguished and lost; but that the conveyance did not operate to extinguish the residue of the common apportionable to the nineteen and three-quarters acres, and that so much passed by Armstrong's deed of July 4th, 1835, to the plaintiff, with a right of way as incident to it and necessary to the enjoyment.

Had the plaintiff remained owner of the whole of this lot of nineteen and three-quarters acres, he would still have been entitled to the common appurtenant. But his right has again been affected by his conveyance to Robert H. Ives of nine and three-quarters acres, part of the nineteen and three-quarters acres. Had he made no reservation of the common in that deed, there would have been an apportionment, and Ives would have taken the portion belonging to nine and three-quarters acres; for though such common may be apportioned, it could not be severed from the estate and granted over, Drury v. Kent, Cro. J. 15, and, because it could not be severed, the plaintiff could not retain it to himself. If it exist at all, it must exist with the estate, the uses of which it is to attend and minister to.

The plaintiff, then, at the time of filing his bill in this case, had a right of common to take from the shore of the defendant's estate seaweed and gravel, and stones below high-water mark, at all times at his will and pleasure, for such purposes as he

might think proper to use them upon his estate; but this right did not extend to the thirty acres to which Armstrong derived title under the mortgage of Nicholas Fry [Taylor] to the Bank of Rhode Island, all right being extinguished as to that, but was limited to that portion of the nineteen and three-quarters acres conveyed by Joseph W. Taylor to Armstrong, by deed of August 12, 1813 [4, 1812], which the plaintiff has not conveyed to Robert H. Ives; and he had also a right of way to and from his said land to the shore for the purpose of exercising this right as incident and necessary to its enjoyment.

This is the extent of his right in our view upon the deeds and conveyances put before us.

CHAPTER XLVII.

RENT.

LITTLETON § 551.

Attornment is, as if there be lord and tenant, and the lord will grant by his deed the services of his tenant to another for term of years, or for term of life, or in tail, or in fee, the tenant must attorn to the grantee in the life of the grantor, by force and virtue of the grant, or otherwise the grant is void. And attornment is no other in effect, but when the tenant hath heard of the grant made by his lord, that the same tenant do agree by word to the said grant, as to say to the grantee, I agree to the grant made to you, &c., or I am well content with the grant made to you; but the most common attornment is, to say, Sir, I attorn to you by force of the said grant, or I become your tenant, &c., or to deliver to the grantee a penny, or a halfpenny, or a farthing, by way of attornment.

Co. Lit. 309 a, b. Attornment is an agreement of the tenant to the grant of the seigniory, or of a rent, or of the donee in tail, or tenant for life or years, to a grant of a reversion or remainder made to another. It is an ancient word of art, and in the common law signifieth a torning or attorning from one to another.

"The tenant must attorn to the grantee in the life of the grantor, &c." And so must he also in the life of the grantee: and this is understood of a grant by deed. And the reason hereof is, for that every grant must take effect as to the substance thereof in the life both of the grantor and the grantee. And in this case if the grantor dieth before attornment, the seigniory, rent, reversion, or remainder descend to his heir; and therefore after his decease the attornment cometh too late; so likewise if the grantee dieth before attornment, an attornment to the heir is void, for nothing descended to him: and if he should take, he should take it as a purchaser, where the heirs were added but as words of limitation of the estate, and not to take as purchasers.

But if the grant were by fine, then albeit the conusor or conusee dieth, yet the grant is good. For by fine levied the state doth pass to the conusee and his heirs; and the attornment to the conusee or his heirs at any time to make privity to distrain is sufficient. But all this is to be taken as Littleton understood it, viz., of such grants as have their operation by the common law. (For since Littleton wrote, if a fine be levied of a seigniory, &c., to another to the use of a third person and his heirs, he and his heirs shall distrain without any attornment, because he is in by the Statute of 27 H. 8, cap. 10, by transferring of the state to the use, and so he is in by act in law.)

And so it is, and for the same cause, if a man at this day by deed indented and enrolled according to the Statute, bargaineth and selleth a seigniory, &c., to another, the seigniory shall pass to him without any attornment; and so it is of a rent, a reversion, and a remainder. So as the law is much changed, and the ancient privilege of tenants, donees, and lessees much altered concerning attornments since Littleton wrote.

But if the conusee of a fine before any attornment by deed indented and enrolled, bargaineth and selleth the seigniory to another, the bargainee shall not distrain, because the bargainer could not distrain.

CHAPTER XLVIII.

COVENANTS RUNNING WITH LAND.

Building Restrictions.

SUPPLEE ET AL. v. COHEN ET AL.

80 N. J. Eq. 83, 83 Atl. 373. 1912.

Bill by William C. Supplee and another against Theresa Cohen and another. Decree for complainants.

The bill seeks the enforcement of a restrictive building covenant. The covenant which complainants seek to enforce is found in a written agreement wherein defendants agreed to sell to complainant William C. Supplee a certain house and lot, and among other things covenanted that no building should be erected on vendors' adjoining lot nearer than three feet from the line which separated the two lots. Pursuant to the agreement of sale defendants subsequently conveyed the lot to complainant Helen F. Supplee, who is the wife of William C. Supplee; the conveyance being made to the wife at the request of her husband. In the deed of conveyance no covenant was inserted touching the engagement of defendants not to build within three feet of the line between the property sold and the property retained. Subsequently defendant Theresa Cohen erected a dwelling upon the lot retained by her in such manner that, while the foundations and main body of the buildings are three feet distant from the division line between the two lots, an overhanging bay window and the eaves of the house project to a point less than three feet from that line. The decree now sought is to compel defendants to remove the overhanging bay window and eaves, or to remove the building so that no part of the eaves and bay window will be nearer than three feet from the division line between the two lots.

LEAMING, V. C. The covenant contained in the agreement of sale, which covenant complainants now seek to enforce, is as follows:

"And further, the parties of the first part do hereby agree to

and with the party of the second part that they shall so provide that no building shall be erected upon the lot adjoining said premises on the west, nearer than three feet from the party line between said lots."

Defendants urge that the deed of conveyance which was made pursuant to the agreement of sale was necessarily operative to discharge all obligations arising under the agreement of sale. I am unable to adopt that view. That effect should only be given to such stipulations in the agreement of sale as could be appropriately discharged by the deed of conveyance. By the agreement of sale defendants agreed to "so provide" that no building should be erected on the adjoining lot in the manner stated. That engagement could not be fulfilled or its fulfillment appropriately secured by a clause to the same effect in the deed of conveyance to complainant. The engagement was, in effect, that defendants would not at any time build upon the adjoining lot contrary to the manner specified and would prevent their grantees from so doing. A covenant in the deed of conveyance to complainants would not have been operative to prevent a grantee of defendants' adjoining lot from building contrary to the covenant, for a grantee of that lot would not be charged by the record with notice of a covenant in complainants' deed. An appropriate method of perpetuating the covenant contained in the agreement of sale would be by a covenant in any deed of conveyance defendants should thereafter make of the adjoining lot owned by them.

I am convinced that complainants were entitled to rely upon defendants' engagement to protect them against the erection of adjoining buildings without any new engagement for that purpose being made at the time of the settlement, in the absence of any evidence to the effect that at the settlement either party understood that the covenant in question was waived.

By a cross-bill defendants seek to have the covenant in question reformed, alleging that the real agreement between the parties touching the location of any building thereafter to be built on defendants' lot was with reference to the main body of such building and did not include a restriction against an overhanging bay window or eaves. The evidence is clearly insufficient to justify a decree of reformation.

It is also contended in behalf of defendants that, even though

the covenant should not be reformed, the restriction touching the distance the "building" should be erected from the line must be understood to refer to the main body of the building and not to overhanging bay windows or eaves. I am unable to adopt that view. The covenant is that no building shall be erected nearer than three feet from the division line. The language used is entirely clear and exact and certain in its meaning, and in the absence of some circumstance sufficient to disclose that the parties used the language adopted by them in a restricted sense the covenant must be understood in accordance with the natural import of the language used. When a person covenants that he will not erect a building within a specified distance from the line between his property and the adjoining property, he necessarily covenants that he will not erect any part of a building within the distance named; to read into such a covenant a reservation that it shall apply only to the main body of the building and shall not apply to projecting bay windows or eaves is clearly without justification unless circumstances exist to warrant the conclusion that such a reservation was intended by the parties. Covenants of this nature are uniformly recognized as designed to afford a given space for air, light, and view; an occupancy of the restricted space in the manner already stated is necessarily a violation of the terms and spirit of the covenant. As hereinbefore stated, the natural import of the language "that no building shall be erected * * * nearer than three feet from the party line" is that no part of a building shall be so erected. That view has heretofore received the sanction of this court and of the Court of Errors and Appeals in Hemsley v. Marlborough Hotel Co., 65 N. J. Eq. 167, 55 Atl. 994; s. c., 68 N. J. Eq. 596, 601, 61 Atl. 455; Wahl v. Stoy, 72 N. J. Eq. 607, 66 Atl. 176. In these cases bay windows which overhung a restrictive building line were regarded as violations of a covenant that no building should be erected nearer than a specified distance from a given line.

It is also urged in behalf of defendants that circumstances exist which disclose that the parties to the covenant here in question used the term "building" with the mutual understanding that bay windows and eaves projecting over the restricted space were not to be regarded as in violation of the covenant. As already stated, the evidence failed to disclose any

mistake of the parties in the execution of the agreement. But it is urged that certain other similar covenants in Atlantic City have been heretofore treated as not applying to bay windows and eaves which overhang restricted spaces, and the claim is made that it must now be held that the present parties adopted the language of the covenant here in question with a like purpose in mind. In support of this contention it is shown that a certain tract of land known as the "Chelsea tract" has been subjected to a covenant requiring all buildings to be located not less than five feet from the side lines of lots, and on that tract there existed at the date of the covenant here in question 195 buildings. Of these 98 had bay windows projecting over the restricted spaces, and 186 had eaves so projecting. There is no evidence in this case that establishes the fact that either of the parties to the present covenant knew that the Chelsea covenant had received a popular construction of the nature referred to, or even knew that any buildings on that tract were so located that bay windows or eaves overhung the restricted spaces. The part of the Chelsea tract nearest the premises here in question is three-quarters of a mile distant. I think it is entirely clear that the covenant here in question can be in no way affected by any possible popular construction which the Chelsea property holders may have given to a similar covenant. It would seem that the most that can be said touching the Chelsea covenant is that the property holders in that district have not seen fit to enforce it.

It is also contended in behalf of defendants that complainants are not materially injured by the encroachment complained of. The projecting bay window extends but 17 inches and the eaves but 16 inches over the restricted space. The distance from the nearest part of defendants' building to complainants' building is 13 feet 8 inches. Under these circumstances it is obvious that no considerable damage is being suffered by complainants by reason of the encroachments. But in cases of this class it is unnecessary for complainants to prove that damage is sustained by them. Kirkpatrick v. Peshine, 24 N. J. Eq. 206, 216; Morrow v. Hasselman, 69 N. J. Eq. 612, 615, 61 Atl. 369. The rights which accrue to complainants under a covenant of this nature are property rights in the restricted space. It may be that at this time the space between the two buildings is adequate to

afford such light, air, and view that complainants suffer no present inconvenience; but complainants may desire at some future time to utilize that part of their lot, now vacant, between their present building and the line which separates the two lots. In such case the present encroachment of defendants' building over the restricted space would clearly be operative to materially lessen the enjoyment by complainants of the light, air, and view which they would enjoy with defendants' building located pursuant to the covenant. The continued occupancy by defendants of the restricted space will, in time, ripen into an adverse right. Without the relief afforded by the remedial process of this court complainants could only prevent defendants' use of the restricted space ripening into a right by successive suits at law for damages essentially nominal in amount. It is for these reasons that a court of equity is obliged to afford relief in a case of this nature even though no considerable damage is presently suffered by complainants.

Nor can it be here appropriately contended by defendants that the damages which will be suffered by them in vacating the part of the restricted space which they now occupy will be disproportionate to the benefits accruing to complainants. Notice forbidding the encroachment was served on defendants by complainants before the building was erected, and the present bill was promptly filed. Defendants have completed their building well knowing of complainants' claim and in the face of the present bill. A preliminary writ of injunction was refused because of a cross-bill filed by defendants to reform the covenant. Under these circumstances, defendants cannot now reasonably complain of the loss they may sustain in being compelled to comply with their covenant.

At the time the bill was filed another structure had been erected by defendants upon the restricted space in the nature of a "spite" fence some 10 feet in height. Defendants now concede that that structure was in violation of the covenant and have removed it. The writ to be issued need not, therefore, have reference to that structure.

I will advise a decree for a mandatory writ of injunction requiring defendants to remove so much of the bay window and eaves of their house as are less than three feet from the division line which separates the lots of complainants and defendants.

PART IV

ACQUISITION OR TRANSFER OF TITLE

A. DURING LIFE WITH CONSENT OF OWNER

CHAPTER XLIX.

FORMS OF CONVEYANCES.

Insertion of Name of Grantee.

MINNEAPOLIS v. HUGHES ET AL.

118 Minn. 404, 136 N. W. 1095. 1912.

Appeal from District Court, Hennepin County; William E. Hale, Judge.

Action by the Board of Education of the City of Minneapolis against Lucius A. Hughes and others. From an order denying a new trial, defendants appeal. Reversed, and new trial granted.

BUNN, J. Action to determine adverse claims to a lot in Minneapolis. The complaint alleged that plantiff owned the lot, and the answer denied this, and alleged title in defendant L. A. Hughes. The trial resulted in a decision in favor of plaintiff, and defendants appealed from an order denying a new trial.

The facts are not in controversy and are as follows: On May 16, 1906, Carrie B Hoerger, a resident of Faribault, owned the lot in question, which was vacant and subject to unpaid delinquent taxes. Defendant L. A. Hughes offered to pay $25 for this lot. His offer was accepted, and he sent his check for the purchase price of this and two other lots bought at the same time to Ed. Hoerger, husband of the owner, together with a deed to be executed and returned. The name of the grantee in the deed was not inserted; the space for the same being left blank. It was executed and acknowledged by Carrie B. Hoerger and her husband on May 17, 1906, and delivered to defendant Hughes by mail. The check was retained and cashed. Hughes filled in the name of the grantee, but not until shortly prior

to the date when the deed was recorded, which was December 16, 1910. On April 27, 1909, Duryea & Wilson, real estate dealers, paid Mrs. Hoerger $25 for a quitclaim deed to the lot, which was executed and delivered to them, but which was not recorded until December 21, 1910. On November 19, 1909, Duryea & Wilson executed and delivered to plaintiff a warranty deed to the lot, which deed was filed for record January 27, 1910. It thus appears that the deed to Hughes was recorded before the deed to Duryea & Wilson, though the deed from them to plaintiff was recorded before the deed to defendant.

The questions for our consideration may be thus stated: (1) Did the deed from Hoerger to Hughes ever become operative? (2) If so, is he a subsequent purchaser whose deed was first duly recorded, within the language of the recording act?

1. The decision of the first question involves a consideration of the effect of the delivery of a deed by the grantor to the grantee with the name of the latter omitted from the space provided for it, without express authority to the grantee to insert his own or another name in the blank space. It is settled that a deed that does not name a grantee is a nullity, and wholly inoperative as a conveyance, until the name of the grantee is legally inserted. Allen v. Allen, 48 Minn. 462, 51 N. W. 473; Clark v. Butts, 73 Minn. 361, 76 N. W. 199; Id., 78 Minn. 374, 81 N. W. 11; Casserly v. Morrow, 101 Minn. 16, 111 N. W. 654. It is clear, therefore, and this is conceded, that the deed to defendant Hughes was not operative as a conveyance until his name was inserted as grantee.

Defendant, however, contends that Hughes had implied authority from the grantor to fill the blank with his own name as grantee, and that when he did so the deed became operative. This contention must, we think, be sustained. Whatever the rule may have been in the past, or may be now in some jurisdictions, we are satisfied that at the present day, and in this state, a deed which is a nullity when delivered because the name of the grantee is omitted becomes operative without a new execution or acknowledgment if the grantee, with either express or implied authority from the grantor, inserts his name in the blank space left for the name of the grantee. In State v. Young, 23 Minn. 551, the instrument was an official bond given by a county treasurer, and no penal sum was named in the bond

when it was delivered to the county commissioners; but it was inserted by the county auditor by direction of the commissioners, without the knowledge of the obligor or sureties. The language of Judge Mitchell is pertinent here in answer to more than one of plaintiff's contentions: "Whatever may formerly have been the rule, or may still be the holding of some courts upon this question, we think the better opinion, both on principle and authority, is that parol authority is adequate and sufficient to authorize an addition to, or alteration of, even a sealed instrument. At the present day the distinction between sealed and unsealed instruments is arbitrary, meaningless, and unsustained by reason. * * * We therefore hold that parol authority is sufficient to authorize the filling of a blank in a sealed instrument, and that such authority may be given in any way by which it might be given in case of an unsealed instrument." As in the case at bar, there was no claim that any express authority was given. It was held that this was unnecessary—that authority could be implied from circumstances, when the facts proved, all taken together and fairly considered, justify the inference. In Casserly v. Morrow, 101 Minn. 16, 111 N. W. 654, the name of an assignee in an assignment of a mortgage was absent when the instrument was delivered. The Chief Justice said: "If, however, Morrow's name was inserted as assignee in the instrument by the authority of the mortgagee, express or implied from circumstances, and then recorded, he was the legal owner of record of the mortgage and entitled to foreclose. State v. Young, 23 Minn. 551; Van Etta v. Evenson, 28 Wis. 33, 9 Am. Rep. 486; Friend v. Yahr, 126 Wis. 291, 104 N. W. 997, 1 L. R. A. (N. S.) 891, 110 Am. St. Rep. 924."

The Wisconsin cases cited as authority in the Morrow Case express the law as we think it ought to be and is in this state. Van Etta v. Evenson was the case of a note and mortgage executed with a blank in each for the name of the payee and mortgagee, and delivered to an agent who was to procure a loan thereon for the maker from whomever he could. It was held that the facts showed an intention that the agent should fill the blanks, and that, when so filled, the instruments were valid, without a new execution and delivery. Dixon, C. J., said in regard to the supports of conflicting decisions: "They are grounds of the purest and most unalloyed technicality, originating in a

state of things and condition of the law which have long since passed away." In Friend v. Yahr the instrument was an assignment of a mortgage, in which the blank space was filled by the assignee with his own name after the delivery of the instrument to him. Marshall, C. J., said: "It will be found decided, in some cases holding that blank spaces, such as the one in question, may be filled up after delivery of the paper by authority in writing, that parol authority is insufficient, and that, if it were otherwise, authority could not be implied from the mere delivery of the paper in its incomplete condition; but the general rule is that when one delivers an instrument, whether the same be required to be under seal or not, so executed as to in form give it full validity upon the filling up of blanks, authority for the holder thereof to do that is implied." The same rule exists in Iowa. Hall v. Kary, 133 Iowa, 465, 110 N. W. 930, 119 Am. St. Rep. 639; Augustine v. Schmitz, 145 Iowa, 591, 124 N. W. 607. In the Hall Case it was held that a deed in which the name of the grantee is left blank, but otherwise fully executed, vests title in the person whose name is subsequently written in by the person to whom it was delivered with authority to do so, and that when the grantor accepts the consideration and delivers the deed, authority to the grantee to fill up the blank must be presumed. The facts in the Augustine Case were the same, as was the ruling. Further authorities are cited in Devlin on Deeds, § 457, notes.

Unquestionably the authorities are in conflict; but this court is committed to the rule that in case of the execution and delivery of a sealed instrument, complete in all respects save that the blank for the name of the grantee is not filled, the grantee may insert his name in the blank space, provided he has authority from the grantor to do so, and, further, that this authority may be in parol, and may be implied from circumstances. We consider this the better rule, and also that it should be and is the law that when the grantor receives and retains the consideration, and delivers the deed in the condition described to the purchaser, authority to insert his name as grantee is presumed. Any other rule would be contrary to good sense and to equity. The same result could perhaps be reached by applying the doctrine of estoppel; but we prefer to base our decision on the ground of implied authority. Clearly the facts in the case

at bar bring it within the principle announced, and we hold that Hughes, when he received the deed from Mrs. Hoerger, had implied authority to insert his name as grantee, in the absence of evidence showing the want of such authority. The delay in filling up the blank has no bearing on the question of the validity of the instrument when the blank was filled.

It is argued that holding that parol authority to fill the blank is sufficient violates the statute of frauds. This theory is the basis of many of the decisions that conflict with the views above expressed; but we do not think it sound. The cases in this state, and the Wisconsin, Iowa, and other decisions referred to, are abundant authority to the proposition that the authority of the grantee need not be in writing. Our conclusion is, therefore, that the deed to Hughes became operative as a conveyance when he inserted his name as grantee.

2. When the Hughes deed was recorded, there was of record a deed to the lot from Duryea & Wilson to plaintiff, but no record showing that Duryea & Wilson had any title to convey. The deed to them from the common grantor had not been recorded. We hold that this record of a deed from an apparent stranger to the title was not notice to Hughes of the prior unrecorded conveyance by his grantor. He was a subsequent purchaser in the good faith for a valuable consideration, whose conveyance was first duly recorded; that is, Hughes' conveyance dates from the time when he filled the blank space, which was after the deed from his grantor to Duryea & Wilson. He was, therefore, a "subsequent purchaser," and is protected by the recording of his deed before the prior deed was recorded. The statute cannot be construed so as to give priority to a deed recorded before, which shows no conveyance from a record owner. It was necessary, not only that the deed to plaintiff should be recorded before the deed to Hughes, but also that the deed to plaintiff's grantor should be first recorded. Webb on Record of Title, § 158; 3 Washburn, Real Property, 292; Losey v. Simpson, 11 N. J. Eq. 246; Burke v. Beveridge, 15 Minn. 205 (Gil. 160); Schoch v. Birdsall, 48 Minn. 443, 51 N. W. 382.

Our conclusion is that the learned trial court should have held on the evidence that defendant L. A. Hughes was the owner of the lot.

Order reversed, and new trial granted.

CHAPTER L.

SURRENDER AND RELEASE.

Surrender by Tenant.

AUER v. PENN.

99 Pa. St. 370. 1882.

PAXSON, J., delivered the opinion of the court, February 13, 1882.

Nothing is better settled in Pennsylvania than that a tenant for years cannot relieve himself from his liability under his covenant to pay rent by vacating the demised premises during the term, and sending the key to his landlord. The reason for it is that in the absence of fraud, one party to a contract cannot rescind it at pleasure. And the landlord may accept the keys, take possession, put a bill on the house for rent, and at the same time apprise his tenant that he still holds him liable for the rent. All this, as was said by Mr. Justice Rogers in Marseilles v. Kerr, 6 Wharton, 500, is for the benefit of the tenant, and is not intended, nor can it have the effect, to put an end to the contract and discharge him from rent. A surrender, a release, or an eviction will undoubtedly relieve a tenant, and it was said by Chief Justice Gibson, in Fisher v. Milliken, 8 Barr, 111, that nothing less would do so. This remark, however, was without the authority of the court, and must be regarded as dictum. The case in hand does not require us to assert so broad a proposition.

There was neither a release nor an eviction here, but the surety claimed to be discharged because after the tenant, who was his principal, sent the keys to the landlord, the latter leased the property to another tenant. Yet there is no pretence that the landlord accepted a surrender; on the contrary, the proof is clear that he declined to do so, and notified the defendant

below that he would hold him for the rent. This notice was repeated on more than one occasion when he was about to lease the property to another tenant. Yet it was urged by the defendant below that such subsequent leasing by the landlord, and the acceptance of rent from the tenant, raised a presumption of a surrender. A surrender of demised premises by the tenant during the term, to be effectual, must be accepted by the lessor. The burden of proof is upon the tenant to show such acceptance. He sets it up to relieve himself from his covenant, and must prove it.

When, therefore, the lessor retains the keys, and at the same time notifies the lessee that he will hold him for the rent, there is no room for the presumption of a surrender. Nor does the renting of the premises to another tenant under such circumstances raise such presumption, for the reason that it is manifestly to the lessee's interest that they should be occupied. The landlord may allow the property to stand idle, and hold the tenant for the entire rent; or he may lease it and hold him for the difference, if any. It was said in Breuckmann v. Twibill, 8 Norris, 58, that "taking possession, repairing, advertising the house to rent, are all acts in the interest and for the benefit of the tenant, and do not discharge him from his covenant to pay rent." Much more is it to the interest of the tenant for the landlord to rent the premises. If at the same rent, the tenant is entirely relieved; if at less, he is liable only for the difference.

Upon the trial in the court below, the learned judge instructed the jury, as set forth in the second assignment of error, as follows:

"If a man refuses to continue your tenant, gives up the house into your hands, why, then, you have a right to put a bill upon the house and try to rent it; because, if you rent it, it is so much saved to Mr. Auer, so much saved to the surety of the tenant, because you have to give an account of every cent you make out of the house; and certainly it is much better for the tenant, that the landlord should rent the house and get something for it, than to simply lock the door and lay by and sue the tenant or surety for the whole amount of the rent for the whole term for which he has taken it; so that, being for the benefit of both parties, it is no presumption that the landlord

has accepted a surrender, that he has taken and leased the house."

We see no error in this. It is good sense as well as good law.

We are not aware of any authorities in this State which are in conflict with the foregoing views. Those cited on behalf of the defendant below certainly are not.

The remaining assignments do not require discussion. The fifth does not fully state the ruling of the court below. As it appears in the bill of exceptions it is entirely correct.

Judgment affirmed.

CHAPTER LI.

DELIVERY AND ACCEPTANCE.

Delivery to Depositary.

COOK v. BROWN.

34 N. H. 460. 1857.

Writ of Entry.

EASTMAN, J. The question which was found for the plaintiff, and upon which the verdict was rendered, was the delivery of the deed by Mrs. Brown, the defendant's husband, to Richard F. Fifield. If this deed was not delivered, the demandant was entitled to recover; and the jury, under the rulings and instruction of the court, have found that it was not.

But were the instructions of the court correct in regard to the delivery of the deed? This is the important question of the case. The court instructed the jury that if the deed was in the hands of the depositary, to be delivered to the grantee, either before or after the death of the grantor, without the grantor's reserving a control over it, then there was a good delivery. But if the grantor reserved such a full control over the deed during her life, and to the last moment of her life, there was no delivery. If she always had the right to control the destination of the deed, there was not a delivery, but if she at any time relinquished her right in favor of the grantee, there was a delivery; that the question was, whether she always, until her death, continued to have the right to recall the deed, if she pleased, and not whether she did in fact recall it. The court were requested to instruct the jury, that if the deed was to remain in the hands of the depositary during the life of the grantor, subject, however, during that time to be revoked by the grantor, and if not revoked then to be recorded, the deed might be regarded as the deed of the grantor from the time of the delivery to the depositary, if it was not subsequently revoked. These instructions the court declined to give, and gave those which we have stated.

The point of difference between the two was this: The court held that in order to make the delivery good, it was essential that the grantor should part with her dominion over the deed. That the time when the grantee was to receive it was not material, whether at or before the decease of the grantor, but that the delivery to the depositary must be without the power of recall in the grantor; while the defendant contended that if the deed was in fact delivered in pursuance of the directions of the grantor, it made no difference that the grantor had reserved the right of recalling the deed at any time.

In Shed v. Shed et al., 3 N. H. 432, where A. made an instrument purporting to convey to his two sons, B. and C., certain tracts of land, with a reservation of the use of the land to himself during his life, and delivered the instrument to D. to be delivered to B. and C. as his deed, after his decease, in case he should not otherwise direct; and A. died without giving any further directions—it was held, that the instrument was to be considered as the deed of A. from the first delivery, and that it might operate as a covenant by A. to stand seised of the land to his own use during life, remainder to B. and C. in fee. Richardson, C. J., in delivering the opinion, says: "In the case now before us, the writing was intended to effect a mere voluntary disposition of the land; and why the grantor might not reserve to himself a right to revoke the writing if he saw fit, does not readily occur to our minds. If he might legally deliver the writing absolutely, to take effect on his decease, we do not see why he might not deliver it conditionally, as an escrow, to take effect upon his decease, in case he did not change his mind and revoke it. Being the absolute owner of the estate, it seems to us that he had an incontestable right to deliver the instrument, absolutely or conditionally, according to his will and pleasure."

The decision in that case would appear to be in point for the defendant, but we do not find any other case in our own Reports, and but one or two in others, which go to that extent. On the other hand, there are many authorities which seem to us to establish a somewhat different rule.

In Parker v. Dustin, 2 Foster, 424, a grantor executed a deed and delivered it to a third person, with instructions to deliver it to the grantee upon the grantor's death. He afterwards told the grantee that he had given him the land, and directed him to

take possession of it, which the grantee did, and afterwards remained in possession; and it was held, that it was a question of fact for the jury, upon the evidence, whether the grantor deposited the deed with the third person, to be delivered at his decease, without reserving any control over it during his life; and that the deed should be considered as delivered or not, as the finding of the jury might be on the question of his intention. That is to say, if he intended to reserve a control over the deed, it was no delivery; but if he did not so intend, it was a delivery.

In Doe v. Knight, 5 Barn. & Cres. 671, the court told the jury that the question was for them to decide whether the delivery to the depositary was, under all the circumstances of the case, a departing with the possession of the deed and of the power and control over it for the benefit of the grantee, and to be delivered to him, either in the lifetime of the grantor or after his death; or whether it was delivered to the depositary, subject to the future control and disposition of the grantor. If for the latter purpose, they should find for the defendant. The point in that case was distinctly put; the defendant was seeking to defeat the deed, and the court held the validity of the deed to depend upon the question, whether the delivery to the depositary was or not subject to the future control of the grantor.

In Commercial Bank v. Reckless, 1 Halstead's Ch. 430, it was held that, to constitute the delivery of a deed, the grantor must part, not only with the possession but with the control of it, and deprive himself of the right to recall it.

In Baldwin v. Maultsby, 5 Iredell, 505, it was held that where there has been no delivery in the lifetime of the grantor, a delivery after his death, though at his request, is void.

In Maynard v. Maynard, 10 Mass. 456, the court, in speaking of the deed which was in controversy in that case, and of the grantor, say: "He probably chose to consider it as revocable at all times by himself, in case of any important change in his family or estate. Whatever may have been his views, however, he retained an authority over it." It is the retaining of the authority over it that shows the delivery to be incomplete. Jackson v. Phipps, 12 Johns. 421; Jackson v. Dunlap, 1 John. Cas. 114; 1 Devereux Eq. 14; C. W. Dudley's Eq. 14; Hooper v. Ramsbottom, 6 Taunton, 12; Habergham v. Vincent, 2 Ves. Jr. 231.

All of these authorities differ essentially from that of Shed v. Shed, and it appears to us that they are founded upon sounder principles.

The delivery of a deed is either absolute or conditional; absolute when it is to the grantee himself or to some person for him; when the grantor parts with all control over it, and has no power to revoke or recall it; conditional, when the delivery is to a third person, to be kept by him until some conditions are to be performed by the grantee. When the delivery is absolute, the estate passes at once to the grantee; but when conditional, the estate remains in the grantor until the condition is performed and the deed delivered over to the grantee. Strictly speaking, a conditional deed is not a deed, but an escrow, a mere writing, the effect of which is to depend upon the performance of the conditions by the grantee. If they are performed it becomes a deed, otherwise it is a mere nullity. Co. Lit. 36; Cruise, title 32, ch. 2; 2 Black Com. 307; 4 Kent's Com. 454; Jackson v. Catlin, 2 Johns. 248; Carr v. Hoxie, 5 Mason, 60; Shep. Touch. 57, 58.

By fiction of law an escrow is sometimes made to take effect from the first delivery. The relation back to the first delivery, however, is allowed only in cases of necessity, to avoid injury to the operation of the deed from events happening between the first and second delivery. 4 Kent's Com. 454; Perkins on Conveyancing, § 138; 3 Coke, 30; 3 Black Com. 43; Frost v. Bechman, 1 Johns. Ch. 297; 5 Co. 84b.

A deed which is put into the hands of a third person, to be delivered to the grantee on the happening of some future event, but where no conditions are to be performed, is not an escrow or conditional deed. Its delivery is not dependent upon any condition to be performed, but it is a valid deed from the beginning, and the holder is but a trustee or agent for the grantee. In such a case the grantor has parted with all control over the deed. Perkins, §§ 143, 144; 6 Mod. 217; Foster v. Mansfield, 3 Met. 412; 4 Kent's Com. 455; Stillwell v. Hubbard, 20 Wendell, 44.

But so long as a deed is within the control and subject to the authority of the grantor, there is no delivery. And whether in the hands of a third person or in the desk of the grantor, is immaterial, since in either case he can destroy it at his pleasure.

To make the delivery good and effectual, the power of dominion over the deed must be parted with. Until then the instrument passes nothing; it is merely ambulatory, and gives no title. It is nothing more than a will defectively executed, and is void under the statute. Rev. Stat. chap. 156, § 6; Habergham v. Vincent, 2 Ves. Jr. 231; Powell on Dev. 13; 1 Rob. on Wills, 59; 4 Bro. Ch. 353; Rob. on Frauds, 337.

The case of Habergham v. Vincent was that of a deed, to take effect by way of appointment, after the death of the party. The subject was elaborately discussed and fully considered by the Chancellor and Justices Wilson and Buller. In the course of the discussion, Buller says: "A deed must take place upon its execution or not at all. It is not necessary for a deed to convey an immediate interest in possession, but it must take place as passing that interest, to be conveyed at the execution, but a will is quite the reverse." And, after examining the various authorities upon the point, he adds: "These cases have established that an instrument in any form, whether a deed poll or indenture, if the obvious purpose is not to take place till after the death of the person making it, shall operate as a will. The cases for that are both at law and in equity, and in one of them there were express words of immediate grant, and a consideration to support it as a grant; but as upon the whole the intention was that it should have a future operation after death, it was considered as a will." And the court all held, that the instrument then under consideration, though called a deed, though in form a deed, was in its nature testamentary, and being attested by only two witnesses, could not pass the freehold estate contrary to the provisions of the statute.

Again, delivery of a deed is as essential to pass an estate as the signing, and so long as the grantor retains the legal control of the instrument, the title cannot pass any more than if he had not signed the deed. A deed may be signed by a third person by virtue of a power of attorney, duly executed, and so may it be delivered to a third person, to be delivered to the grantee. But the authority in such cases must be executed during the life of the grantor, otherwise it "availeth nothing," for no man can create an authority which shall survive him. After his decease the right "is forthwith in the heir." Lit. § 66; Willes, 105; Co. Lit. 52b. There must be a time when the

grantor parts with his dominion over the deed, else it can never have been delivered. So long as it is in the hands of a depositary, subject to be recalled by the grantor at any time, the grantee has no right to it, and can acquire none; and if the grantor dies without parting with his control over the deed, it has not been delivered during his life, and after his decease no one can have the power to deliver it. The depositary must have had such a dominion over the deed during the lifetime of the grantor as the latter could not interfere with, in order to have any control over it after his decease.

We think the instructions of the court below were correct; and that if the grantor, until her death, reserved the right to recall the deed from the hands of the depositary, there was no delivery.

The law of the case is not changed by treating this instrument as a deed of bargain and sale, or by way of covenant to stand seised for uses, as contended by the defendant's counsel. The Statute of Uses, 27 Henry VIII, has been adopted in this state, and a freehold estate in futuro may be thus conveyed. French v. French, 3 N. H. 234; Bell v. Scammon, 15 N. H. 381. This instrument may perhaps be regarded either as a deed of bargain and sale, or as a covenant to stand seised for uses. A bargain and sale requires a pecuniary consideration. 4 Cruise, 110; Jackson v. Fiske, 10 Johns. 456; and a conveyance to stand seised for uses requires the consideration of blood or marriage. 4 Cruise, 120; 4 Kent's Com. 493; Rex v. Scammonden, 3 Term, 474; Underwood v. Campbell, 14 N. H. 393. This instrument had expressed in it a small pecuniary consideration, and the evidence would seem also to show a sufficient relationship upon which to found a deed to stand seised for uses. But delivery is as essential to the valid operation of an instrument of this kind as to one conveying the estate immediately; and the jury having found that this deed was never delivered, a verdict for the plaintiff followed as a necessary consequence.

If the owner of land desires to convey the same, but not to have his deed take effect until his decease, he can make a reservation of a life estate in the deed; or it may be done by the absolute delivery of the deed to a third person, to be passed to the grantee upon the decease of the grantor; the holder in such case being a trustee for the grantee. But if he wishes to retain the power of changing the disposition of the property

at his pleasure, that can only be properly effected by will. So long as he retains the instrument, whether in the form of a deed or will, in his power, the property is his.

The motion in arrest of judgment cannot prevail. The count was sufficient after verdict.

The verdict having been returned for the plaintiff, and the rulings and instructions to which the defendant excepted having been sustained, it becomes unnecessary to consider the exceptions which were taken by the plaintiff, and there must be judgment on the verdict.

Escrow.

ALABAMA COAL & COKE CO. v. GULF COAL & COKE CO.

165 Ala. 304, 51 S. 570. 1910.

Appeal from Law and Equity Court, Walker County; T. L. Sowell, Judge.

Ejectment by the Alabama Coal & Coke Company against the Gulf Coal & Coke Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Plaintiffs claim title through deed from one Peters, who claimed title from Key. The defendants claim title through Musgrove, and from Key to Musgrove. It was undisputed that Key made a deed to Peters, which in some manner got upon the records. It was shown that this deed was delivered by Key to Hancock, who was purchasing land for Peters, with the agreement and understanding that it would not be delivered to Peters until the purchase price was paid, and it was shown that that had not been done. It was further shown that Hancock told Musgrove of the Key deed, but told him that the conditions had not been complied with, and that the deed had not been delivered to Peters because thereof, and that the deed was dead. It further appears that at the time Musgrove took the Key deed he did not know of the fact that the deed from Key to Peters was recorded, and that when he conveyed to defendant he was not aware of that fact. The court found these, among others, to be the facts, further finding that the delivery to Hancock was in escrow, and that there was never a delivery to Peters, and rendered judgment for defendant.

ANDERSON, J. The general rule is that the delivery of a deed to the grantee or his agent cannot be a delivery in escrow. Shelby v. Tardy, 84 Ala. 330, 4 South. 276; Cherry v. Herring, 83 Ala. 458, 3 South. 667. A delivery to the agent or attorney of the grantee has the same effect as a delivery to the grantee personally, and a deed so delivered cannot be an escrow. "Where a perfectly executed deed of release is delivered to a known agent of the release, it is in law a delivery to the principal; and it is immaterial by what verbal stipulations or conditions its delivery was accompanied, as to its operation after delivery, it will, notwithstanding, be operative from its delivery. It is not, however, an inevitable conclusion that the mere delivery of manual possession is a valid delivery of the deed. If the acceptance of an agency from both parties will involve no violation of duty to either, the releasor may make the agent of the releasee his own agent for the purpose of holding the deed as an escrow, and returning it to him in case a stipulated condition is not performed. The rule that a delivery to an agent of the grantee is equivalent to a delivery to the grantee himself would not apply in such a case, because there is not that personal identity between the releasee and his agent, upon which the reason for the rule depends. A grantor may make the agent of the grantee, it is conceded, his own agent for the purpose of holding the deed and returning it to him in case a condition agreed upon is not performed." Devlin on Deeds, vol. 1, § 316; Ashford v. Prewitt, 102 Ala. 264, 14 South, 663, 48 Am. St. Rep. 37; Cincinnati R. R. v. Iliff, 13 Ohio St. 235; Sou. Ins. Co. v. Cole, 4 Fla. 359; Price v. Pittsburg Co., 34 Ill. 13; Watkins v. Nash, L. R. 20 Eq. 262; Wier v. Batdorf, 24 Neb. 83, 38 N. W. 22.

The proof in the case at bar shows that, notwithstanding Hancock was the purchasing agent of Peters, the grantor, Key, made him his agent to hold the deed until he got the purchase money from Peters, and to return the deed in case Peters did not send him the purchase money. Nor could the performance of this act on the part of Hancock involve a violation of duty owing from him to Peters. He did not undertake to get lands or deeds from people for Peters for nothing. He was employed by Peters to purchase land, and the undertaking by him to hold Key's deed as an escrow until the purchase money was

paid by Peters was in perfect harmony and consistency with the duty he owed Peters, and called for the violation of no duty he owed his first principal, the grantee. In the case of Ashford v. Prewitt, supra, the condition upon which the deed was delivered to Moore was in writing, and the court expressed relief over not having to rely upon oral testimony in arriving at Mrs. Ashford's intention in delivering the paper to Moore; but we do not understand that the court held or intimated that a writing was essential to establish an escrow. On the other hand, it was held that, notwithstanding Moore was the attorney of the grantee, Mrs. Ashford had the right to also constitute him her agent to hold the deed conditionally, and that it operated as a legal delivery in escrow.

Parol evidence is admissible to show that a deed in the possession of a grantee was not delivered. The principle that parol evidence is not admissible to contradict a deed has no application to a case of this kind. "There is a distinction to be drawn between a case where evidence is offered for the purpose of showing a deed was not to be delivered until the performance of some condition precedent and a case where it was actually delivered with an agreement that the condition was to be performed. In the former case the object of introducing such testimony is to show that the instrument was never legally delivered, and that, consequently, it never possessed any vitality. In the latter, the effect of the evidence would be to contradict a written instrument which is absolute upon its face, by showing in opposition to its terms that it was conditional and not absolute." 1 Devlin on Deeds, § 205, and cases cited in note.

Whether the case of Gulf Coal & Coke Co. v. Alabama Coal & Coke Co., 145 Ala. 228, 40 South. 397, is or is not sound in holding there was no equitable estoppel, or that the plaintiffs in this case could not be bona fide purchasers, we need not determine, as the equitable estoppel contended for by the appellant is not available in this action of ejectment. Milam v. Coley, 144 Ala. 535, 39 South. 511; Vankirk v. Green, 132 Ala. 348, 31 South. 484.

The judgment of the law and equity court is affirmed.

Affirmed.

CHAPTER LIV.

COVENANTS OF TITLE.

Damages.

COLE v. KIMBALL.

52 Vt. 639. 1880.

Covenant. The declaration counted on a covenant against encumbrances in a deed from the defendant to the plaintiff Florette. The case was referred, and the referee reported in substance as follows:

On August 26, 1871, the defendant by warranty deed containing the usual covenants, including a covenant against encumbrances, conveyed to the plaintiff Florette certain premises in Braintree that had been conveyed to him by Mansel Heselton and wife; and said Florette, in payment therefor, conveyed to the defendant a farm which had before been conveyed to her by her father, Leonard Fish, and with her husband executed to him a promissory note for $462, which said Leonard afterwards paid. On June 11, 1872, the plaintiffs by like deed conveyed the premises to Lucia M. Fish, the mother of said Florette, and wife of said Leonard. The premises when conveyed by the defendant as aforesaid, were subject to a mortgage executed by Heselton and wife to Elihu Hyde in 1869, conditioned for the payment of two promissory notes for $250 each, payable in one and two years respectively, with interest, one of which only had been paid. In December, 1875, Hyde brought a petition for foreclosure against the Fishes and others, but not against the Heseltons nor the Coles, and in the following January obtained a decree for $313.29, the sum due in equity, and $28.55 costs, to be paid before January 1, 1877, with interest. On November 1, 1876, Hyde sold and assigned that decree to Ephraim Thayer for $350, Thayer acting therein for said Leonard and at his request; and afterwards, and before this action was brought, said Leonard, acting therein for his wife,

paid Thayer the amount of the decree in full, with interest. The conveyance from said Leonard to said Florette, and from her to said Lucia were without consideration, and they and the holding of title by said Florette were for the convenience, and at the request, of the Fishes, said Leonard doing all the business in connection therewith, and the plaintiffs having nothing to do with it, except to execute deeds, etc., as desired. This action was brought and prosecuted by said Lucia, in her own behalf and for her own benefit, and with the privity and consent of said Leonard. The referee found that if the plaintiffs were entitled to recover, they should recover $341.84, with interest from January 1, 1876.

While the action was pending, the Fishes, in consideration that final judgment should ultimately be rendered therein for the plaintiffs for the full amount of damages found by the referee, filed in court a release of the defendant from all causes of action that they or either of them had, or could have, in their own names to recover damages consequent on a breach of any of the covenants in his deed to said Florette.

The court, at the December term, 1879, Powers, J., presiding, rendered judgment on the report for the plaintiffs for nominal damages and costs; to which the plaintiffs excepted.

The opinion of the court was delivered by

ROYCE, J. It is conceded that the plaintiffs are entitled to nominal damages; and the only question made is, whether upon the facts found by the referee they are limited to the recovery of such damages, or are entitled to recover the amount paid to redeem the premises from the Hyde decree. This suit was brought and prosecuted by Lucia M. Fish, for her benefit. with the privity and consent of her husband, Leonard Fish, who acted for her in paying the money to redeem the premises from the Hyde decree. Florette D. Cole held the title to the premises conveyed to her by the defendant as the trustee of Leonard and Lucia M. Fish, and the covenants contained in the deed from the defendant to Florette D. are in equity to be treated as covenants for the benefit of the cestuis que trust. All the interest that Florette D. had in said covenants passed to Lucia M. Fish by the deed from the plaintiffs to her. The defendant is liable on the covenants in his deed to protect the

title against the encumbrances that were upon the premises described in the deed at the time of its execution. The covenant against encumbrances runs with the land, and can be enforced for the benefit of the party holding the legal title. The payment of the amount due on the Hyde decree was not a voluntary payment, but a compulsory one. Fish was obliged to make it to save his title to the premises. The claim to indemnity on account of the breach of the covenants of title and against encumbrances was a chose in action, and was transferred to Lucia M. Fish by the deed from the plaintiffs to her; and the assignee of a chose in action has the right (subject to the right of the assignor to require indemnity against costs) to sue in the name of the assignor. It is a matter of indifference to the defendant to whom he pays, if he is fully protected against any further liability. It is not claimed that there is any other party but Leonard Fish and wife that could make any claim against the defendant on account of his covenants; and the discharge filed in the case is a full protection against any claim that they might otherwise make. The rule of law that limits the recovery in actions of covenant against encumbrances to the amount paid to remove the encumbrance was adopted for the protection of the covenantor, for until full payment the liability of the covenantor would continue. The cases relied upon by the defendant differ from this in the important fact that in none of those cases did it appear that the suit was being prosecuted for the benefit of an assignee who had been compelled to make payment to save his estate, and full indemnity had been tendered to the covenantor. The attempted defense is purely technical; and it does not appear that any defense which the defendant might have made if the suit had been in the name of Leonard Fish and wife was not equally available to him in the present suit. In Smith v. Perry, Admr., 26 Vt. 279, the plaintiff had not paid the judgment recovered by his grantee on account of the breach of his covenant of title, but the court allowed a full recovery to be had, protecting the defendant's estate against further liability by the form of the judgment rendered. Here, as we have seen, the defendant is protected by the discharge filed.

Judgment reversed, and judgment for the largest sum.

Reversed.

Conflict Between General and Special Warranties.

JOINER ET AL. v. ARDMORE LOAN & TRUST CO.

124 Pac. 1073 (Okla.). 1912.

Error from District Court, Carter County; S. H. Russell, Judge.

Action by the Ardmore Loan & Trust Company against C. M. Joiner and another. Judgment for plaintiff, and defendants bring error. Reversed and remanded.

DUNN, J. This case presents error from the district court of Carter county. The defendant in error as plaintiff begun its action to recover from plaintiffs in error on certain promissory notes given as part of the purchase price for certain lands described in a deed dated May 20, 1908, upon which a lien was retained as security for the payment thereof.

* * * * * * * * *

The defendants pleaded that they purchased the lands, relying on the covenants, representations, and agreement of plaintiff that it was lawfully seised in fee of the lands, and that it had a good right to convey the same. The particular section of the deed in which these covenants are contained reads as follows: "To have and to hold the above described premises unto the said C. M. Joiner, his heirs and assigns in fee simple forever. And the said Ardmore Loan & Trust Company does for itself, its successors and assigns, covenant and agree with the said C. M. Joiner, his heirs and assigns, that it is lawfully seised in fee of the afore granted premises, that the same is free and clear of all liens and incumbrances, except deferred payments, which is assumed by the grantees, that it has a good right to sell and convey the same unto the said C. M. Joiner, his heirs and assigns, and that it will forever warrant and defend the same unto the said C. M. Joiner, his heirs, executors, administrators and assigns against the lawful claims of any and all persons whomsoever, lawfully claiming or to claim the same or any part thereof, by, through or under it, a vendor's lien is hereby retained on said property to secure the deferred payments as set out above." The foregoing covenant and agreement that plaintiff was lawfully seised in fee of the

premises, and that the same were free and clear of all liens and incumbrances, and that it had a good right to sell and convey the same, except as to deferred payments mentioned, is a covenant for title. Maupin on Marketable Title to Real Estate (2d Ed.) § 108. Therein is stated the rule generally prevailing in the United States "that a covenant that the grantor is 'lawfully seised' is the same as if he had covenanted that he was rightfully seised of an indefeasible estate in fee simple, and is to be treated as 'an assurance to the purchaser that the grantor has the very estate in quantity and quality which he purports to convey.'" See, also, Devlin on Deeds (3d Ed.) § 885, and the authorities therein noted. The rule which generally prevails in the United States under such a covenant is stated by the Supreme Court of Tennessee in the case of Kincaid v. Brittain, 5 Sneed (Tenn.) 119, as follows: "A covenant of seisin in a deed for land is an assurance to the purchaser that the vendor has the very estate in quality and quantity which he purports to convey. It imports a seisin in law, and exacts a perfect title; and is not fulfilled by a transfer to the purchaser of an actual seisin."

Section 19, Act. Cong. April 26, 1906, c. 1876, 34 Stats. L., part. 1, pp. 137, 144, provided in part as follows: "That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of, or incumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this act, unless such restriction shall, prior to the expiration of said period, be removed by act of Congress. * * *" The restrictions had not at the time of these conveyances been removed, and hence it must follow, under this act, that the deed was void and plaintiff had no title which it could convey, and none which could inure to the benefit of its grantee. This fact was not only known to the plaintiff at the time, but was equally known to the defendants, and the question arises whether the defendants with this knowledge could avail themselves of the failure of title in the plaintiff, and plead that their contract was without consideration because of this fact. An investigation of the authorities convinces us that they could. The rule seems to be that: "The right of recovery for a breach of a covenant of seisin is not affected by the fact that it was

known to one or both of the parties at the time the covenant was made that the grantor had no title to the land or any part of it. Bailey, P. J., in the case cited (Wadhams v. Innes, 4 Ill. App. 642, 646), quoted with approval the language of the Supreme Court of that state in a former case (Beach v. Miller, 51 Ill. 211, 2 Am. Rep. 290): 'Where a person insists upon and obtains covenants for title, he has the right, when obtained, to rely upon them and enforce their performance, or recover damages for their breach. The vendor is under no compulsion to make covenants when he sells land, but, having done so, he must keep them or respond in damages for injury sustained by their breach. Nor is it a release or discharge of the covenant to say that both parties knew it was not true, or that it would not be performed when it was made. A person may warrant an article to be sound when both buyer and seller know that it is unsound; so the seller may warrant the quantity or quality of an article he sells when both parties know that it is not of the quality or does not contain the quantity warranted. In fact, the reason the purchaser insists upon covenants for title, or a warranty of quality or quantity, is because he either knows or fears that the title is not good, or that the article lacks in quantity or quality.'" Devlin on Real Estate (3d Ed.) § 897. See, also, Rawle on Covenants for Title (5th Ed.) § 88; Maupin on Marketable Title to Real Estate, p. 335; Batterton et al. v. Smith, 3 Kan. App. 419, 43 Pac. 275; Bolinger et al. v. Brake, 4 Kan. App. 180, 45 Pac. 950; Yancey v. Tatlock et al., 93 Iowa, 386, 61 N. W. 997; Evans v. Taylor, 177 Pa. 286, 35 Atl. 635, 69 L. R. A. 790.

But it is insisted on the part of counsel for plaintiff that its general covenant of title to the defendants was limited in its scope by that portion of the deed which read that it would warrant and defend the same unto the said grantee "against the lawful claims of any and all persons whomsoever, lawfully claiming or to claim the same or any part thereof, by, through or under it," and that, under this special warranty, its grantee was entitled to recover as against it only by showing that the failure of title of which he complained was due to some act, deed, or conveyance of which it was responsible. The effect of a special warranty contained in a deed following general covenants of title has been a source of much vexation to the

courts. The rule for the construction of all contracts when there are conflicting provisions therein, so as to render the terms thereof ambiguous, is to ascertain as far as possible, from the language of the contract, the intent of the parties. Paragraph 788, Wilson's Rev. & Ann. St. 1903, provides for the purpose of ascertaining the intention of parties to a contract that the rules given in this chapter (chapter 15, Wilson's Rev. & Ann. Statutes) are to be applied. Paragraph 790, Id., provides: "When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible, subject, however, to the other provisions of this title." Paragraph 792, Id., provides: "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the others." Paragraph 794, Id., provides: "A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable and capable of being carried into effect, if it can be done without violating the intention of the parties." Paragraph 800, Id., provides: "If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it." Paragraph 801, Id., provides: "Particular clauses of a contract are subordinate to its general intent." Paragraph 803, Id., provides: "Repugnancy in a contract must be reconciled, if possible, by such an interpretation as will give some effect to the repugnant clause, subordinate to the general intent and purposes of the whole contract." Paragraph 804, Id., provides: "Words in a contract which are wholly inconsistent with its nature, or with the main intention of the parties, are to be rejected." Paragraph 805, Id., provides: "In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party, except in a contract between a public officer or body as such, and a private party, in which it is presumed that all uncertainty was caused by the private party."

From the foregoing provisions of the statute it is to be observed that the purpose of all interpretations is to secure and arrive at the actual agreement into which the parties

entered, to ascertain the real intent in their minds at the time they dealt, and that this intent, when it is ascertained, shall be by the court given effect, but that, where ambiguity or uncertainty exists in the terms of any promise, the intention is to be interpreted in the sense in which the promisor believed that the promisee understood it, and that any uncertainty not removed by these considerations must be interpreted most strongly against the party who caused the uncertainty to exist, and that the promisor, except in cases of public officials, is presumed to be such party. In other words, therefore, in the construction of the contract here before us, the grantor is presumed to be the party who caused the uncertainty to exist. The foregoing statutes relate generally to the interpretation of contracts, but the rule therein laid down, conceding that uncertainty or repugnancy exists in this deed, requires us to construe the terms of this instrument against the promisor rather than in its favor.

This rule is by the courts generally applied to conflicting or inconsistent covenants in deeds, and to this end it is generally held, as stated in the syllabus of the leading case of Bender v. Fromberger, 4 Dall. 436, 1 L. Ed. 898, that "a special warranty in a deed has not the effect of controlling a precedent general covenant." In this case it appears that the defendant and his wife had sold and conveyed a tract of land, and in their deed had "covenanted that the defendant was lawfully seised of a good, sure and indefeasible estate of inheritance, in fee simple, in the said land, and had good right, full power, and authority, in his own right, to grant and convey the same to the plaintiff in fee. The deed also contained a special warranty against the grantor and his heirs, and all persons claiming under them." On an action in which it was assigned as a breach that the defendant was not seised nor had he a good right to convey the land in fee to the plaintiff, the court in considering the contentions of the defendant said: "The defendant contends that his intention was to give no more than a special warranty, because the clause of special warranty is inconsistent with, and contradictory to, a general warranty. Now, in this, I cannot agree with him. It is certain that the special warranty, and more, is included in the general one. It is an inaccurate mode of conveyancing; but there is no absurdity or contradiction in

making one covenant against yourself and your heirs, and another against all mankind. The special warranty was unnecessary, and is to be attributed to the ignorance of the scrivener, who, probably, thought it was a matter of course, without intending, to affect the more general preceding covenant, or, perhaps, he might think it necessary to guard against the effect of the words 'grant, bargain, and sell,' used in the first part of the deed, because the estate was subject to a ground rent, as appears from the general covenant, in which it is said that the estate is free from all incumbrances except the said ground rent. It has been urged that it is all one covenant, because the special warranty is connected with the preceding general covenant by the words 'and that.' It is very common to connect a covenant of warranty and a covenant for further assurance by these expressions. But what I rely on is the intent of the parties, manifested in the deed considered altogether. I do not conceive it is possible for a man of common sense to declare that he engages that he had a perfect estate in fee simple and had a good right to convey such perfect estate, without intending to warrant to a greater extent than against himself and his heir. There are no technical expressions, but such as every man understands, which is not the case with a special warranty. To a common man it is not very intelligible that there should ever be occasion to warrant and defend against himself, and all persons claiming under him; for it is very natural to suppose that, when a man has used words sufficient to convey his estate to a third person, he has necessarily done enough to bar himself and all persons claiming under him without calling in the aid of a special warranty. In short, the insertion of the clause of special warranty is generally the act of scriveners; but I presume that no scrivener could be so stupid as to insert a covenant that 'the grantor was seised of an indefeasible estate in fee,' unless he had been told by the parties that a general warranty was intended. I am therefore of opinion that the special warranty in this deed has not the effect of controlling the preceding general covenant, and that judgment should be entered for the plaintiff."

The foregoing discussion in our judgment is entirely applicable to the deed which is here before us. The general covenant of title and of the right to convey embraced all that the special

warranty contained and more. The special warranty herein was without effect to operate upon the title which the grantor had conveyed. To give to this special warranty the force contended for by counsel for grantor would be to allow plaintiff to take from defendants, not only the money which it had already received, but to recover the amount sued for herein, and that, too, without any consideration whatsoever. Such a construction would require on the part of the court the rendition of a judgment in plaintiff's favor, and exact from the defendants the money prayed for upon the mere empty covenant contained in the deed. The defendants were not contracting for a promise. They were dealing with plaintiff in order to secure title to land, and, when it develops that plaintiff is wholly without title and that defendants secure absolutely nothing, no court, prompted by considerations of justice, will enforce such a demand. A somewhat similar case is that of Rice v. Goddard, 14 Pick. (Mass.) 293, the syllabus therein reads as follows: "In an action on a promissory note given for the purchase money of land conveyed by deed with covenants of seisin and warranty, the action being between the original parties, it is competent for the defendant to prove by way of defense a total failure of title to the land." In the discussion of this case the Supreme Judicial Court of Massachusetts said: "The note was given in consideration of the conveyance of land by deed with the usual covenants of seisin and warranty. The title to the land failed entirely; and the question is whether that want of title is an entire want of consideration for the note, so as to render it nudum pactum, or whether the covenants were of themselves a sufficient consideration to support the promise. It was decided by the court in Maine in Lloyd v. Jewell, 1 Greenl. 360, that the covenants were a sufficient consideration. The decisions of that court are entitled to great respect. The opinion, however, in the case cited was grounded on what was considered to be the settled law of Massachusetts; but, though there have been dictums (Fowler v. Shearer, 7 Mass. 19; Phelps v. Decker, 10 Mass. 279), there has been no decision in this state to that effect, and so the foundation of the opinion fails. The same subject has been before the courts of other states, and the decisions have uniformly been that a total failure of title is a total failure of consideration. Frisbee

v. Hoffnagle, 11 Johns. (N. Y.) 50; McAllister v. Reab, 4 Wend. (N. Y.) 483; Steinhauer v. Witman, 1 Serg. & R. (Pa.) 447; Gray v. Handkinson, 1 Bay (S. C.) 278; Bell v. Huggins, 1 Bay (S. C.) 327; Chandler v. Marsh, 3 Vt. 162; Tillotson v. Grapes, 4 N. H. 448. The promise is not made for a promise, but for the land, the moving cause is the estate, and, if that fails to pass, the promise is a mere nudum pactum."

Defendants tendered a reconveyance and demanded judgment for the amount which they had paid, and the same considerations which demand at our hands a denial of the right of plaintiff to a judgment it seems to us should grant to the defendants the right to recover. On the question of possession on failure of the title, and the breach of the covenant, see Faller v. Davis et ux., 118 Pac. 382; Fitzhugh v. Croghan, 2 J. J. Marsh (Ky.) 429, 19 Am. Dec. 139. Plaintiff has accepted from defendants a sum of money for which it gave nothing. It went through the form of conveying a title to certain lands which it did not own, and to which it could give no right. It admits having received from defendants the sum of money pleaded in the answer which in our judgment it has no right to retain for the simple reason that it has never given anything for it. In such a case an action will lie to recover, for whenever one has the money of another which he in equity and good conscience has no right to retain it may be recovered. Allsman et al. v. Oklahoma City, 21 Okl. 142, 95 Pac. 468, 16 L. R. A. (N. S.) 511, 17 Ann. Cas. 184.

The judgment of the trial court on the demurrer is accordingly reversed, and the cause is remanded to take such further proceedings not inconsistent with this opinion as the facts developed on a trial may show to be just and equitable.

CHAPTER LV.

RECORDING LAWS.

Unrecorded Deed. Adverse Possession.

HOOPER v. LEAVITT.

109 Me. 70, 82 Atl. 547. 1912.

Action by George L. Hooper against Ella S. Leavitt. On report. Judgment for defendant.

Argued before Whitehouse, C. J., and Cornish, King, Bird, Haley, and Hanson, JJ.

KING, J. Real action, reported to the law court. The land demanded is a small island known as Cape Island, situated at Cape Porpoise in the town of Kennebunkport. The defendant pleaded the general issue with a brief statement of title in herself. The real issue, then, is which party shows the better title.

This island was owned by John Bickford at the time of his death in 1836. By his will it passed to his wife, Susan Bickford, for her life, and after her death to his two children, John W. and Lucy E., in fee simple.

April 26, 1847, Susan Bickford, the life tenant, gave to Clement Huff a warranty deed recorded July 3, 1847, purporting to convey the island in fee. It is admitted that Susan Bickford died May 16, 1867.

The plaintiff claims his record title to the island from Huff and through the following conveyances: Warranty deed from Clement Huff to Payson T. Huff and Henry F. Huff, dated June 25, 1880, recorded March 2, 1883; warranty deed from Payson T. Huff to Anna S. Huff and Bertie W. Huff, dated February 22, 1883, recorded March 2, 1883; and warranty deed from Anna S. Huff, Bertie W. Huff, and Henry F. Huff to George L. Hooper (the plaintiff), dated August 25, 1890, recorded September 11, 1890.

On the other hand, the defendant claims her record title to the island through mesne conveyances from John W. Bickford and Lucy E. (Bickford) Goodwin, the remaindermen, as

follows: Quitclaim deed from John W. Bickford to Justin M. Leavitt, dated November 27, 1897, recorded same day; quitclaim deed from Lucy E. Goodwin to Justin M. Leavitt, dated December 1, 1897, recorded same day; and warranty deed from Justin M. Leavitt to Ella S. Leavitt, dated November 20, 1902, recorded the same day. The defendant also introduced a deed from the State of Maine to Justin M. Leavitt, dated October 5, 1897, recorded October 7, 1897, in which deed "Cape" Island with other islands is described as conveyed. In all of the conveyances in each chain of title the island in question is clearly described as the property conveyed and not merely the grantors' "right, title, and interest therein."

The first question, then, is: Which of these record titles is the better? Obviously the answer must be in favor of the defendant's title, for that is complete and securely established in the recorded conveyances from the remaindermen, who had the full title of record after the termination of the life estate in 1867.

On the other hand, the plaintiff's title of record is fatally defective. By the deed from Susan Bickford to Clement Huff no greater estate was, or could have been, conveyed than the grantor then had, which was an estate for her life. Moulton v. Edgecomb, 52 Me. 31, 32, and R. S., c. 75, § 8. Accordingly, Clement Huff acquired under that deed only a life estate which terminated at the death of Susan Bickford, May 16, 1867.

But the plaintiff introduced an instrument, of which the following is a copy, written on the back of the deed from Susan Bickford to Clement Huff, but which was not recorded, however, till March 22, 1898.

"We John Bickford and Lucy Goodwin, wife of Francis W. Goodwin, all of Kennebunkport & County of York, do hereby relinquish all our right and title to the within described Island & do confirm the doings of the within named Susan Bickford in the sale of the same.

"In testimony whereof we have hereunto set our hands & seals this twenty-fourth day of April in the year eighteen hundred & forty nine.

"John W. Bickford, (Seal.)
"Lucy E. Goodwin, (Seal.)
"Francis W. Goodwin. (Seal.)

"Signed, sealed & delivered in presence of us: Payson T. Huff."

That instrument was admitted subject to objection. Against its validity and admissibility it has been suggested that no grantee is named in it, that John W. Bickford was a minor at the time he signed it, and that it is an unacknowledged instrument and therefore was not entitled to record as a deed. But we do not regard it important to specially consider those suggestions, since we are of opinion that that instrument, not having been recorded at the time of the deeds to Justin M. Leavitt under which the defendant claims, even though it should be regarded as sufficient in form and substance to constitute a valid deed, and, even if it had been acknowledged, could have no legal effect as against the defendant's record title, unless it be shown that Mr. Leavitt, at the time he took his deeds, had actual notice that the prior instrument had been given. The law is too well settled in this state to admit of doubt that the title acquired under a recorded conveyance of specific real estate is valid against an unrecorded previous conveyance of the same property by the same grantor, unless it be shown that the grantee in the recorded conveyance, when he took it, had actual notice of the previous conveyance. Our statute expressly provides: "No conveyance of an estate in fee simple, fee tail or for life, or lease for more than seven years, is effectual against any person except the grantor, his heirs and devisees, and persons having actual notice thereof, unless the deed is recorded as herein provided." R. S., c. 75, § 11.

It is suggested in behalf of the plaintiff that, because the recorded deeds from the remaindermen to Mr. Leavitt given in 1897 were quitclaim deeds, they were not effectual against the prior unrecorded instrument in question. But the answer is that the deeds to Leavitt, though quitclaim and without covenants, were not conveyances of the grantors' right, title, or interest in the demanded premises, but purported to convey an actual title to the specific property—describing the island definitely as the property conveyed.

Prior to 1903 it had been held by this court (Coe v. Persons Unknown, 43 Me. 432; Walker v. Lincoln, 45 Me. 67, and other cases) that a conveyance of all the right, title, and interest which the grantor has in and to the land described in his deed conveys only the right, title, and interest which he actually has at the time of the conveyance, and consequently that such

a conveyance, although recorded, would not be effectual against a prior unrecorded conveyance of the same land. The reason given for holding that doctrine was that when a grantee takes a conveyance by so indefinite a description as "the right, title, and interest," which the grantor has, he must take the risk of the grantor's right, title, and interest. Coe v. Persons Unknown, supra. But this doctrine was never held applicable to conveyances, although of quitclaim without covenants, in which the property was specifically described as conveyed, and not containing the limiting words, "all right, title, and interest," etc. In 1903 the Legislature enacted that "conveyances of the right, title, or interest of the grantor, if duly recorded, shall be as effectual against prior unrecorded conveyances as if they purported to convey an actual title." Laws 1903, c. 220. The conveyances to Mr. Leavitt from the remaindermen, although given prior to the act of 1903, were not conveyances of the right, title, or interest of the grantors, but purported to convey an actual title to the island in question, and in the opinion of the court they are to be held effectual against the prior unrecorded instrument in question, unless Mr. Leavitt had actual notice thereof.

The burden of proving the fact of actual notice was on the plaintiff. Unquestionably that fact, like any other fact to be proved, may be established by direct evidence, or it may be inferred as a legitimate conclusion from indirect evidence—by circumstantial evidence. But in considering whether or not the evidence of such fact, relied upon in any given case, is sufficient, it must be borne in mind that actual notice is the requirement of the statute, and it is that fact that must be proved, whether the evidence be direct or circumstantial.

An examination of the record in this case fails to disclose any substantial evidence offered by the plaintiff reasonably tending to establish such fact. But he relies upon certain facts and circumstances, testified to by Mr. Leavitt, as circumstantial evidence tending to prove such actual notice. Those facts and circumstances are: That Mr. Leavitt, being at the time register of deeds for York county, where the conveyances of Cape Island were recorded, examined the records and thereby acquired actual knowledge of the various warranty conveyances under which the plaintiff claimed title to the island; that he knew, or ought

to have known, that John W. Bickford and Lucy E. Goodwin were not in the actual possession of the island; that he procured his deeds from them, not directly, but through an agent; and that he made no inquiries, directly or through his agent, as to whether or not the remaindermen had made any previous conveyance of the property.

But from those facts and circumstances we do not think it can be inferred as a legitimate conclusion that Mr. Leavitt had or is chargeable with actual notice that the instrument in question had been given. On the other hand, he testifies that at the time he took his deeds he had no notice or knowledge, either actual or otherwise, of the existence of the instrument in question, and that the first knowledge he had of it was "the next year afterwards" when it came to the registry for record. Considering all the evidence bearing on this branch of the case, it is the opinion of the court that there is not sufficient proof that Mr. Leavitt at the time he took his deeds had actual notice of the instrument in question.

The plaintiff further seems to suggest, as we understand his brief, that the remaindermen were disseised by reason of the giving of the warranty deed in fee of the island from Susan Bickford to Clement Huff under which he took actual possession, and that, being disseised, they could convey nothing to Leavitt by their deeds unless it appeared that they had made an entry upon the property and were in the actual possession of it at the time those deeds were given. The answer to that suggestion is two-fold: First, that a conveyance by a tenant for life of a greater estate than he can lawfully convey will not work a forfeiture, and no expectant estate can be defeated by any act of the owner of the precedent estate or by any destruction of it (R. S., c. 75, § 8); and, second, that "a person owning real estate and having a right of entry into it, whether seised of it or not, may convey it, or all his interest in it, by a deed to be acknowledged and recorded as hereinafter provided." R. S., c. 75, § 1.

Accordingly, the deeds from the remaindermen to Leavitt were effectual to convey any and all interest they then had in the demanded premises, whether they were then seised of the premises or not. And this brings us, finally, to a consideration of the question whether John W. Bickford and Lucy E. Good-

win, at the time of their respective conveyances to Leavitt in 1897, had lost all their title to the island by adverse possession.

In discussing this branch of the case it should be said at the outset that the learned counsel for the plaintiff, in his oral argument, stated that the plaintiff did not rely upon a title to the demanded premises acquired by disseisin. But, inasmuch as we find in the brief for the plaintiff some assertion of a title seemingly based upon the doctrine of adverse possession, we deem it proper here to consider that question.

It has already been noted that the life tenant, Susan Bickford, died May 16, 1867. Accordingly such possession and occupation of the demanded premises as Clement Huff had prior to May 16, 1867, was not adverse to the remaindermen, because they had no right of entry until the termination of the life estate by its own limitation. Our statute of limitations of real actions (and the statute in force in 1847 was to the same effect) expressly provides that the right of entry of a remainderman first accrues "when the intermediate estate would expire by its own limitation, notwithstanding any forfeiture thereof for which he might enter at any earlier time." R. S., c. 107, § 3, cl. 3. This question of adverse possession, therefore, is to be determined by the extent and character of the use and occupation of the demanded premises by the plaintiff and those under whom he claims since May 16, 1867.

The demanded premises is a small, rocky, almost barren, island, containing about seven acres, connected with another island by a half-tide bar. No one ever lived on it, and no buildings were ever built upon it. Its soil is untillable, and no material effort was ever made by any one to cultivate any part of it. Clement Huff, the grantee of the life tenant, gave a deed of the island to his sons, Payson T. Huff and Henry F. Huff, in 1880, thirteen years after the death of the life tenant. Those grantees were called as witnesses for the plaintiff. They testified that their father built a wall of stones around the shore of the island where needed to keep sheep from coming on, which wall was washed down by the sea after two years; that he cut hay on the island two years, and permitted a yoke of oxen to be pastured thereon for one year. But those acts of occupation by Clement Huff were done soon after the deed from Susan Bickford to him was given, many years before her death, and

while he was rightfully in possession of the island under his deed from her as the life tenant. The evidence of those acts, therefore, has no bearing on the question whether the remaindermen were disseised after the life estate terminated in 1867 by its own limitation, except so far as it indicates the physical character and condition of the island. Neither of the sons of Clement Huff testified to any overt act of occupation of the island by their father during the period of thirteen years from the death of the life tenant to the time of the conveyance to them in 1880. On the other hand, they testified in cross-examination that they did not know of anything which their father did on the island after the death of the life tenant. And there is no testimony in the record from any witness tending to show any acts of occupation of the island by Clement Huff, or by any one under authority of him, during that period.

It does appear, however, that Payson T. Huff and Henry F. Huff, after the deed from Clement Huff to them in 1880, built a wire fence across the bar, about midway between the two islands, to keep sheep from passing from the other island to Cape Island; that they cut some hay on it twice, and let a third party pasture some sheep there one season. But it is evident that they did not regard those acts of much consequence, for Henry F. Huff, in answer to a question as to what they did on the island, said: "We never did much of anything. We were on a number of times, but never got any benefit from the island then."

The plaintiff, a resident of Massachusetts, was a summer visitor at Cape Porpoise for many years, with more or less regularity, and after he took his deed of the island in 1890 he visited it frequently as a place of resort. At one time he set out a few small trees there, but they did not live. Asked as to what other acts he did on the island, he said: "Really nothing except to visit the island, pick berries and fish from the rocks. Q. How many people have you seen doing the same thing when you were there? A. Hundreds of them."

In Roberts v. Richards, 84 Me. 1, 10, 24 Atl. 425, 428, it was said that the essential use and occupation to establish adverse possession, unless expressly brought home to the knowledge of the owner, "must be of such unequivocal character as will reasonably indicate to him visiting the premises during the

statute period that, instead of their suggesting the probable invasion of a mere occasional trespasser, they unmistakably show an asserted exclusive appropriation and ownership." The court there also quoted from Worcester v. Lord, 56 Me. 265, 269, 96 Am. Dec. 456, that: "There must be overt acts which leave no room to inquire about intention, and which amount to actual ouster."

Applying these principles to the case at bar, it will not be difficult, we think, to reach a correct decision.

It has been noted that there is no evidence of any acts of occupation of the island by Clement Huff during the first thirteen years after the termination of the life estate, from 1867 to 1880, and the remaindermen conveyed to Leavitt within twenty years after 1880. But the acts of occupation shown to have occurred after 1880 were not of such unequivocal character as to reasonably indicate to the remaindermen visiting the property an asserted exclusive appropriation and ownership of it. The existence of the wire fence built across the bar in tide water, midway between the islands, might as reasonably suggest that it had been built by the occupier of the other island to keep the sheep thereon from crossing the bar, as that it was built by some one claiming ownership of Cape Island. The other acts are few and really suggestive of nothing more than that freedom of use which is habitually made of the small islands along our coast by fishermen and pleasure seekers. Indeed, Henry F. Huff, the plaintiff's witness, testified that others used Cape Island "just when they had a mind to—free for any one to go on." As was said in Roberts v. Richards, supra, this court has already declared "that much more significant acts on wild and uncultivated land are not sufficient to disseise the real owner."

It is therefore the opinion of the court that there is not sufficient evidence of acts of occupation of the demanded premises by the plaintiff, and those under whom he claims, to establish a title by disseisin or adverse possession, good against John W. Bickford and Lucy E. Goodwin at the time of their conveyances to Justin M. Leavitt in 1897, or that has since ripened into a title against the defendant.

Judgment for the defendant.

CHAPTER LVI.

TORRENS SYSTEM OF LAND REGISTRATION.

PETERS v. DULUTH ET AL.

119 Minn. 96, 137 N. W. 390. 1912.

Proceeding by G. Willis Peters, as sole surviving trustee, etc., to register title under the Torrens law, to which the City of Duluth and others were made parties. From an order denying a demand for a jury trial, and from an order denying a motion to dismiss, Louis Polinsky appeals. Appeal dismissed.

PHILIP E. BROWN, J. Application to register title under the Torrens law. The application showed and the examiner found title in the applicant proper for registration, and also that the land was unoccupied, except that the appellant, Louis Polinsky, and several others were using the same for pasture purposes, as licensees at will, under an oral license from the applicant. The examiner further found that the said Polinsky had erected a small barn upon part of the premises, and recommended that the said persons should be made parties to the proceeding, and that the applicant be granted the relief prayed. The said Polinsky, having been made a party, filed an answer, claiming fee ownership by adverse possession of the land covered by the application; and, further, that the court had no jurisdiction to try the action, and that the form of action was not such as was required by the Constitution or statutes to try the right of possession of lands; and upon the issues made by the application and the answer he demanded a jury trial. This demand was denied; whereupon he moved to dismiss the action on the following grounds: (1) Because it appears on the face of the proceedings that the defendant Polinsky is in the actual and also the adverse possession of the land, and hence that the court had no jurisdiction to try the action and to determine the rights of the parties therein. (2) Because the action, by the pleadings, is one to determine the right of possession of real

estate against a party in possession, and the defendant has been refused a jury trial; and, further, because the Registration Act is unconstitutional and void as to the defendant. (3) Because the Registration Act does not provide for the trial of the rights of the defendant on the merits, and hence is unconstitutional and void as to the defendant. This motion to dismiss was denied, and from the order denying the defendant's demand for a jury trial, and also the order denying his motion to dismiss, he appealed.

The appellant's contentions, as reformulated in his brief, and in the order in which we will consider them, are: (1) That the refusal of the court to grant a jury trial was a denial of a right guaranteed by Const., art. 1, § 4; (2) that the court had no jurisdiction to try the action on the showing of possession, for the reason that the law under which the application is made does not provide for a complete trial of the issue under Const., art. 1, § 8; (3) that the applicant has a plain and adequate remedy at law, which appears on the face of the proceedings, to-wit, ejectment; and that the action should be dismissed on this account.

1. At the outset we are confronted with a question, not insisted upon by the respondent, but necessary, nevertheless, to be considered, namely, the appealability of the orders appealed from, and we hold that they are not appealable. In view, however, of the importance of the questions involved, we have decided to discuss the case upon its merits.

2. The statute under consideration is more or less similar to the registration acts of a number of other states, and provides for what is commonly called the "Torrens System" of registration of land titles; such system being named after Sir Robert Torrens, of South Australia, who first introduced it into use among English-speaking people, though a similar system had been in vogue in some parts of the present German Empire for many years. Tiffany on Real Property, p. 1101. It is worthy of notice, in this connection, that Sir Robert was not a lawyer. He was a collector of customs, and very probably he worked out his system through analogy to the method by which the government furnished a certificate as evidence of one's ownership of a vessel. Manifestly his intent was to free land titles from the indictment of common sense, which is often framed in the impa-

tient and seemingly unanswerable question: Why should there be any greater uncertainty of ownership of land than of personalty, and why should land titles have to be searched through a "godless and profitless jungle?" The system was introduced into South Australia in 1858; and while, since that time, it has found more or less favor with people of English extraction, it seems that it yet has thorny paths to tread. Its author, as aptly said by the writer of the learned and interesting article on this system in 54 Cent. Law Journal, 285, "little knew, as we may assume, the immeasurable distance which the common law had placed between rights of ownership of real estate and of personal property. He never dreamed that, out of the dead past, the ghostly hand of the 'unknown claimant,' the 'party entitled to notice,' 'the person under disability,' 'the absent defendant,' and other well-known spooks clad in the dignity of judicial decisions of many generations, is held able to stretch out and fasten upon real property as distinguished from personalty." Nor, we may add, did he foresee the narrow path the system would have to tread through the many and various limitations of the American Constitution, before it could establish itself in the states of the American Union. Yet such has been the case; and, while its constitutionality has been vindicated in this and also a number of other states, as against assault made upon various grounds, undoubtedly it yet has further tests to undergo in such regard—witness the attack in the instant case.

Ohio seems to have enacted the first act adopting the Torrens System; but such act was promptly declared unconstitutional as not providing for sufficient notice, and for lack of judicial proceedings. State v. Guilbert, 56 Ohio St. 575, 629, 47 N. E. 551, 38 L. R. A. 519, 60 Am. St. Rep. 756. Illinois came next, with an act which, after amendment, was declared constitutional in People v. Simon, 176 Ill. 165, 52 N. E. 910, 44 L. R. A. 801, 68 Am. St. Rep. 175. Next came Massachusetts, with an act which was sustained in Tyler v. Judges, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433, and then followed California, Colorado, Oregon, and Minnesota; the acts of the two former being declared constitutional in Robinson v. Kerrigan, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90, 12 Ann. Cas. 829, and People v. Crissman, 41 Colo. 450, 92 Pac. 949, respectively, and the Minnesota law being sustained in State v. Westfall, 85 Minn. 437, 89 N. W.

175, 57 L. R. A. 297, 89 Am. St. Rep. 571. The attacks upon the various acts mentioned were based upon one or more of the grounds urged in the case last cited, viz., denial of due process of law, violation of the constitutional provision relative to the severance of the three several departments of government, violation of provisions relative to the election of county officers and provisions relative to special legislation; but in each instance, as above recited, except in Ohio, the law has been sustained.

It would seem that, in the course of the attacks upon the validity of the system in question as a law, the grounds of attack would have been exhausted, and that we would have some direct precedent to guide us in the instant case; but we have neither been cited to nor found any case directly in point, and must, therefore, determine the questions here involved practically as of first impression, though not without abundant analogies and authorities upon the basic principles upon which our determination must rest. Furthermore, the history of the Torrens system, as briefly outlined above, may well be considered as shedding considerable light upon the intent and purpose of the system in general and in our own state in particular, and as thus affording some assistance in determining the nature of the proceedings by which a Torrens title is perfected; for upon such latter consideration the vulnerability of the statute to the present attack largely depends.

3. One other question presents itself before we come directly to the constitutional questions here involved, and that is whether, under the Registration Act and the general laws of the state, the appellant was entitled to a jury trial in the instant case; for if he was so entitled, no constitutional right to a jury that he may have had, can have been violated by the statute, and there would be only a judicial error involved in this branch of the case. However, we are satisfied that neither such statute nor the general law contemplates a jury trial as a matter of right. The provision of the Registration Act relative to trial is as follows: "3388. Trial—Reference. Where an answer is filed, the case shall be tried by the court in like manner as an ordinary civil action. The court may refer the case, or any part thereof, to one of the examiners, as referee, to hear the parties and their evidence, and make report thereon to the court. Any report of

an examiner shall have the same weight as that of a referee appointed by the district court. After the filing of such report, the court may order such other or further hearing of the cause before the court, or before the examiner, and may require such other or further proof by either or any of the parties to the cause as it shall deem proper."

Manifestly there is here no affirmative expression of an intent that any issue in the proceedings shall be tried by a jury. Indeed, it would seem that the contrary was intended. Nor is any right to a jury in these proceedings conferred by the general law, which is as follows (R. L. 1905, § 4164): "In actions for the recovery of money only, or of specific real or personal property, or for a divorce on the ground of adultery, the issues of fact shall be tried by a jury, unless a jury trial be waived or a reference be ordered. All other issues of fact shall be tried by the court, subject to the right of the parties to consent, or of the court to order, that the whole issue, or any specific question of fact shall be tried by a jury or referred."

The only provision here which could possibly be invoked as giving the right to a jury trial in registration proceedings is that relative to the recovery of specific real property, and suffice it to say that no such recovery is contemplated by the Registration Act, and none can be had thereunder. Whether, under such act or the general law, the court, in its discretion, could order a jury trial is not here involved and was not argued, and we do not deem it necessary to determine.

4. The next question, then, is, Does the constitutional provision relative to the right to a trial by jury apply? In Massachusetts it has been held that the right to a jury trial cannot be denied in registration proceedings, where the title to real property is involved (Weeks v. Brooks, 205 Mass. 458, 92 N. E. 45); but the constitutional provision in that state is that there shall be a right to a jury trial "in all controversies concerning property" (Const. Mass. 1780, pt. 1, art. 15), which is very different from the provision of our Constitution. The latter (article 1, § 4) provides: "The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy."

It is settled beyond question that this provision merely preserves the right to trial by jury as it existed at the time of the

adoption of the constitutional provision. State v. Kingsley, 85 Minn. 215, 88 N. W. 742; State v. Minnesota Thresher Co., 40 Minn. 213, 41 N. W. 1020, 3 L. R. A. 510; In re Howes, 38 Minn. 403, 38 N. W. 104; Bruggerman v. True, 25 Minn. 123; Board of County Commissioners v. Morrison, 22 Minn. 178; Ames v. Lake Superior, etc., Co., 21 Minn. 241; Whallon v. Bancroft, 4 Minn. 109 (Gil. 70). Said Gilfillan, C. J., in Board of County Commissioners v. Morrison, supra, at page 181 of 22 Minn., after making an extensive review of the cases from this and other states and announcing the rule as we have stated it: "It is not, of course, to be understood from this that the right to a jury trial will depend on the form of the action or proceeding, or that the Legislature may, by changing the form of the proceeding or remedy, take that mode of trial from those rights to which the Constitution intended to secure it. The Constitution of Vermont provides: 'Trial of issues proper for the cognizance of a jury in the Supreme and county courts, shall be by jury, except when parties otherwise agree.' This, though differently expressed, is substantially the same as the provision of the Constitution of this state. The Supreme Court of Vermont, discussing this clause in Plimpton v. Town of Somerset, 33 Vt. 283, said: 'All rights, whether then or thereafter arising, which would properly fall into those classes of rights to which, by the course of common law, the trial jury was secured were intended to be embraced within this article.' This is the best definition that we have found of the classes of cases to which the trial by jury is secured; for it makes the right to such a trial depend on the nature and character of the controversy, and not on the form of the action or proceeding in which it is to be determined." Again, the rule, as stated in Lommen v. Minneapolis G. Co., 65 Minn. 196, 209, 68 N. W. 53, 54 (33 L. R. A. 437, 60 Am. St. Rep. 450), and approved in State v. Kingsley, supra, is that, under the Constitution, parties are entitled to a jury trial "in those cases in which they were entitled to a jury trial by the laws of the territory at the time of the adoption of the Constitution."

The question before us, then, is: What is the real nature of the proceedings under the Registration Act, and do the issues which arise therein, and, specifically, the issue of title here involved, make cases, or a case, in which the parties would have

been entitled to a jury trial prior to the adoption of the Constitution? The Registration Act is too long to set out herein; nor do we deem it necessary to refer specifically to its various provisions in detail. In discussing the general question of the constitutionality of the Torrens laws, we have already pointed out the general purpose of such laws, viz., to clear up and settle land titles; and there is at once suggested the question as to what the existing or former remedies for this purpose were, the answer to which is, quieting title and removal of cloud. And such has been declared to be the nature of registration proceedings. See Tiffany on Real Property, § 488, p. 1101; State v. Westfall, 85 Minn. 437, 89 N. W. 175, 57 L. R. A. 297, 89 Am. St. Rep. 571. See, also, Owsley v. Johnson, 95 Minn. 168, 103 N. W. 903, where the proceeding is declared to be an equitable one.

"It is now the settled doctrine of this court," said Chief Justice Start, in State v. Westfall, supra, at page 444 of 85 Minn., 89 N. W. 177, 57 L. R. A. 297, 89 Am. St. Rep. 571, "that the district courts of this state may be clothed with full power to inquire into and conclusively adjudicate the state of the title of all land within their respective jurisdiction. * * * The proceeding provided for by the act in question is such a one. * * * To hold otherwise would be to hold that the courts of this state cannot in any manner acquire jurisdiction to *clear and quiet the title to real estate.* * * * That the courts of this state have jurisdiction to so *clear and quiet title* by their decrees is no longer an open question in this state." We have italicized certain words in the above quotation. The Chief Justice was discussing the constitutionality of the Registration Act, with reference to the service of process and due process of law, and by the deliberate use of the analogy adopted clearly indicates the court's conception of the nature of the registration proceedings. However, even if we had no precedent to guide us, we think it clear, from a mere reading of the statute, that such is the nature of the proceeding provided for thereby; and, such being the case, it follows that the constitutional right to a jury trial does not apply. There was no such right upon the ancient bill to remove cloud and quiet title, and it has been held in this state that the constitutional guaranty does not apply thereto. Yanish v. Pioneer Fuel Co., 64 Minn. 175, 66 N. W. 198. It was

held in that case that the defendant had no right to a jury trial in an action by an assignee in insolvency to set aside an execution sale and to cancel the record of the plaintiff's certificate. Said the court at page 179 of 64 Minn., at page 200 of 66 N. W.: "The next question arises upon the right of the defendant to a jury trial. This action was not brought for the recovery of money only, or for specific real or personal property. Title to the real estate in question passed to the respondent by virtue of the deed of assignment, and the defendant's judgment, and its sale of the property under the execution on the judgment, constituted a cloud upon the respondent's title to the property; and he had a right to invoke the equitable power of the court to remove the cloud of an apparent lien of the judgment, set aside the sheriff's sale, and cancel the sheriff's certificate. Although the practical result would be the recovery of the property, yet the gist of the action is to get rid of a cloud resting upon the title, and thus make the property available as assets for the payment of the insolvent's creditors."

Again, it has been held that such provision does not apply to the statutory action to determine adverse claims. Roussain v. Patten, 46 Minn. 308, 48 N. W. 1122; Johnson v. Peterson, 90 Minn. 503, 97 N. W. 384. Said Collins, J., in delivering the opinion of the court in the latter case: "Except as otherwise provided by statute, all the ordinary rules governing suits in equity to quiet title apply to this action, and it was triable by the court, and not by a jury; * * * and the fact that the answer contained a counterclaim in ejectment did not change the procedure."

Exactly in line with the above authorities, and only a step in advance, it seems to us, is it to hold that neither is there any constitutional guaranty of a jury trial in this registration proceeding, which, to our mind, is nothing more or less than an enlargement of the remedy to quiet title. The fact that the ultimate right of possession may be involved does not change the nature of the proceedings. Such right is involved in all actions concerning the title to real property. Buffalo Land & Exploration Co. v. Strong, 101 Minn. 27, 111 N. W. 728; Tew v. Webster, 106 Minn. 185, 118 N. W. 554; Bracken v. Trones, 136 N. W. 281. If, therefore, we should adopt the rule contended for by the appellant and apply it to its logical limit, then every

action wherein the title to real property was in question would necessarily be for a jury. Such was not the law in territorial days, and is not now.

5. The appellant's other constitutional point is that the statute violates Const. art. 1, § 8, which is as follows: "Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property or character; he ought to obtain justice freely and without purchase; completely and without delay, conformable to the laws."

This provision, the appellant claims, is violated by the following provision of the statute (R. L. 1905, § 3389): "Dismissal—If the court shall find after hearing that the applicant has not a title proper for registration, an order shall be entered dismissing the application, which may be without prejudice. The applicant may upon motion dismiss the application at any time before the final decree entered upon such terms as shall be fixed by the court."

It is contended that this provision precludes a final adjudication of the defendant's rights in any case, and in the instant case precludes an adjudication of his claim of title by adverse possession; and that for this reason the statutory proceeding is invalid. We cannot sustain this contention. As pointed out in the respondent's brief, the same objection may, to a certain extent, be urged against any civil action in which the defendant files no counterclaim. The constitutional provision, furthermore, relates primarily to the assertion of affirmative rights, and the defendant here, being in possession, had the right, prior to the proceeding here involved, to clear up his title, if any he had, by an action to quiet title; and in the present proceeding the court is abundantly authorized and empowered to adjudicate his title completely and fully as against the applicant (Hendicks v. Hess, 112 Minn. 252, 255, 127 N. W. 995; Reed v. Siddall, 94 Minn. 216, 102 N. W. 453), which is all that is accorded the defendant in any civil action, except where he takes the proper steps for affirmative relief. This provision has been held not to create any new right, but to be merely a declaration of a general, fundamental principle. Francis v. Western Union Telegraph Co., 58 Minn. 252, 59 N. W. 1078, 25 L. R. A. 406, 49 Am. St. Rep. 507; Beaulieu v. Great Northern Ry. Co., 103 Minn. 47, 114 N. W. 353, 19 L. R. A. (N. S.) 564, 14 Ann. Cas.

462. That class of provisions to which the one here in question belongs are "not, and from the nature of the case cannot be, so certain and definite as to form rules for judicial decisions in all cases, but up to a certain point must be treated as guides to legislative judgment, rather than as absolute limitations of their power." Allen v. Pioneer Press Co., 40 Minn. 117, 123, 41 N. W. 936, 938 (3 L. R. A. 532, 12 Am. St. Rep. 707). It has also been held that this provision is not violated solely because the granting of the remedy rests in the sound discretion of the court. Wieland v. Shillock, 24 Minn. 345. The statute in question merely vests in the court the power, to be exercised in its sound discretion, to save the applicant's rights in a proper case, and does not violate the constitutional provision invoked against it.

6. The appellant's last contention is that, as the applicant was out of possession and the appellant was in possession, the former had a plain and adequate remedy at law; and that hence the application to register should have been dismissed. The contention is that the act contemplates registration only at the instance of a fee title owner in possession, and not by an "apparent owner," who is not in possession. We think, however, that this contention cannot prevail. The purpose of the statute is to provide a speedy and summary remedy to clear up title to land. Reed v. Siddall, 94 Minn. 216, 102 N. W. 453. The remedy provided is not a substitute for an action of ejectment, as we have already noted, and a successful applicant may have to resort to ejectment to obtain possession. The statute, furthermore, in several places makes provision looking to cases where the land is occupied by another than the applicant, among which is the following (R. L. 1905, § 3375), relative to the contents of the application, subd. 6: "Whether the land is occupied or unoccupied. If occupied by any other person than the applicant, it shall state the full name and address of each occupant, and the nature of the estate, interest, lien or charge which such occupant or occupants have, or claim to have, in the land." See, also, State v. Westfall, supra; Kuby v. Ryder, 114 Minn. 217, 130 N. W. 1100. Nor can we sustain the contention that the applicant's title must be settled before he can apply. The very purpose of the proceeding is to settle the title. See State v. Westfall, supra; Nat. B. & S. Co. v. Alderson, 99 Minn. 137, 108 N. W. 861; Hendricks v. Hess, supra.

Since, then, the right to invoke the remedy is given by the statute, the adequacy and availability of other remedies are immaterial. Moreover, the relief in ejectment is not coextensive with that which may be had upon an application to register. As against any one party or set of parties, it may be practically the same; but it needs no argument to show that a title could never, in ejectment, be settled as against the whole world, as can be done upon an application to register. And, conversely, relief may be had in ejectment which cannot be had in the registration proceeding, viz., possession of the premises. The remedies are distinct and different; and hence the appellant's point in this regard is not well taken.

Appeal dismissed.

CHAPTER LVII.

DEDICATION.

ELLIS ET AL. v. HAZELHURST.

138 Ga. 181, 75 S. E. 99. 1912.

Action by the Mayor and Aldermen of Hazelhurst against R. S. Ellis and others. Judgment for plaintiffs, and defendants bring error. Reversed.

EVANS, P. J. This contest is between the city of Hazelhurst and a landowner over the width of Gill street. The landowner was proceeding to erect a fence on what he claimed to be the outer limits of his land abutting on Gill street, and the city filed a petition to enjoin the building of the fence, which was alleged to encroach 20 feet on the street. The city submitted evidence tending to show the following: Gill street extends westward from Second avenue to the incorporate limits, crossing a branch. In 1898 W. C. Swain owned a tract of land lying westward from the branch and reaching beyond the city limits. He lived on this land, and desired to open a street 80 feet in width from the branch to the corporate limits of the town. Accordingly, in that year, he staked out a street 80 feet in width from the branch to the city limits, and constructed fences on both sides of the street. In some places the fences were a little more than 80 feet apart. He said to several people that he would give the street to the town if they would open it up. He told his son that he was giving the street to the town to open it up. In 1899 he sold 12 acres of land to Mr. Leeth, "beginning at the old hand mill branch at the foot of Gill street, and then running 280 yards towards the residence of the said W. C. Swain, down a street 80 feet wide to be given and appropriated to the town of Hazelhurst by the said W. C. Swain, bounding said 12 acres on the south." He also sold land to Mr. Deal, giving Gill street as a boundary. He told another person that "he donated that 80-foot street to the town if they would open it up." Shortly after

these declarations and transactions, the city authorities worked the street by grading the roadbed from the branch to the top of the hill, keeping it in repair, and constructing a sidewalk on the north side for about 280 yards. From the top of the hill to the city limits the land was level, and the consistency of the soil was such that the roadbed required very little attention to keep it in good condition. The city's street force, and some citizens who were permitted to do personal labor in lieu of street tax, worked the street, shaping up the roadbed to the top of the hill, and cutting the underbrush from the top of the hill to the corporate limits. The larger trees were not cut, but were left for shade trees. The sidewalk was constructed on the northern side of the street, and the roadbed, including the drain ditches to the top of the hill, was about 35 or 40 feet wide, and from the top of the hill the roadbed was level, and had been worked sufficiently to keep it in repair up to the filing of the suit. The defendant Ellis purchased a tract of land, which embraced the street in its description, from W. C. Swain in December, 1903. He testified that, when Swain sold him the land, he told him "that he had opened up that road out there himself, so that he would be able to sell to Mr. Leeth; * * * that he intended giving the plaintiff a street, but had not done so." At the time the defendant bought the land from Swain, there was just a road opened up about 12 feet wide, and that was all that Swain ever opened up. The fences built by Swain were about 120 feet apart. The defendant had built the fence, with the exception of two panels, at the time of the service of the injunction; and these were built afterwards by permission of the court. The defendants offered testimony as to the amount of the work done by the city, the character of the growth of the timber on the land, and the intention of Swain to give to the city the street if it would open it up.

1. Under the testimony submitted by the plaintiff, the jury were authorized to find a dedication of the street to the city and its acceptance by the city, and the court properly refused a nonsuit.

2-4. A dedication results where one being the owner of land consents either expressly or by his actions that it may be used by the public for any particular purpose. No particular form is required in making a dedication. It may be done orally or in

writing, or it may be inferred from acts or implied from long user. Mayor, etc., of Macon v. Franklin, 12 Ga. 239. An express dedication of a particularly described parcel of land to a public use may be established by parol evidence, and its acceptance also be so shown. Where an owner of land makes an express dedication of a particular portion of his land to a municipal corporation, its acceptance may be shown by any act of the municipality recognizing the existence of the street and treating it as one of the streets of the city.

Where the extent of the grant is defined by the landowner himself in his statement making an express dedication to a municipality, it is not necessary that the public authorities should work the entire street within the confines of the grant to make effectual the act of acceptance. Any improvements or repairs done on the street by the public authorities in recognition of the dedication of a defined strip of land for a street may be regarded as an acceptance of the dedication. 1 Elliott on Roads and Streets, §§ 167, 168, 169. The distinction should be noted between acts of user when solely relied on to raise an implication of a dedication, and acts of user as evidencing an acceptance of an express dedication. In the former case a dedication will not be implied beyond the use (Swift v. Lithonia, 101 Ga. 706, 29 S. E. 12), while in the latter the dedicator has definitely fixed the limits of the land dedicated to public use, and proof of any acts by the public authorities, done in recognition of the offer of dedication, will be sufficient to imply an acceptance of the dedication.

An express acceptance is usually shown by the order of some officer or body having jurisdiction in such matters. Inasmuch as an acceptance of the dedication of a street imposes upon a municipality duties and burdens with respect thereto, if an express acceptance be relied on, it must be by authorized officials or governing body. 1 Elliott on Roads and Streets, § 166. It was therefore erroneous for the court to charge the jury, on the subject of express acceptance, that "acceptance by any official of the city would be presumed to be done by the authority from the city itself."

5. One of the points made by the defendant is that the dedication was made on the condition that the entire width of the street should be opened up by the city, and that the failure of

the city to cut the trees and remove every obstruction within the 80 feet defeated the dedication. If the dedicator by the act of dedication had expressly provided that the acceptance could be evidenced only by such acts, there could be no acceptance except in compliance with the terms imposed by the dedicator. On the other hand, if the intent of the dedicator was to dedicate a street of a specified dimension to be opened up by the city, if it was opened up by the city so as to meet all the exigencies of safe and convenient travel, such acts by the city would be sufficient to indicate acceptance of all that was dedicated.

6. Over the defendant's objection the court allowed in evidence a deed to J. W. Leeth from W. C. Swain, the defendant's predecessor in title, recorded prior to the defendant's purchase, wherein the land conveyed was bounded as follows: Beginning at the old hand mill branch at the foot of Gill street, and running 280 yards toward the residence of W. C. Swain, down a street 80 feet wide to be given and appropriated to the town of Hazelhurst by W. C. Swain, bounding said 12 acres on the south, etc. This deed was admissible as a declaration of the dedicator of his intention to donate the street to the town. The deed from Leeth to Miles was inadmissible, being res inter alios acta.

7. The court allowed testimony to the effect that a witness and the defendant, just prior to the filing of the suit, measured the street and staked it off. While this testimony bore no relation to the act of dedication, its admission was not harmful to the defendant.

Judgment reversed. All the Justices concur.

Ways on Recorded Plan.

DOUGLASS v. BELKNAP SPRINGS LAND CO. ET AL.

76 N. H. 254, 81 Atl. 1086. 1911.

Transferred from Superior Court, Belknap County; Pike, Judge.

Bill by Walter B. Douglass against the Belknap Springs Land Company and another. Transferred from the superior court. Case discharged.

In 1889 the Winnipesaukee Land Company owned a tract of

land on the lake shore in Alton, and made a plan of the same, dividing it into house lots with appropriate streets, including one following the shore line the entire length of the tract and called Lake Shore Avenue. The company caused the plan to be recorded in the registry of deeds and sold some lots by reference to it, several of which are now owned by the plaintiff. In a short time the unsold balance of the land was taken on execution; and in 1897 that part of the land so taken lying north of the railroad and bordering on the lake was owned by the defendants William H. and Louis D. Russell, and that part lying south of the railroad by the defendant company. The purchasers of certain lots on Lake Shore avenue have erected buildings across the avenue. There was a mistake in the survey, and in one place there is some 200 feet less width of land than is shown on the plan. Some lots sold, which are shown on the plan as inside ones, in fact border on the shore or the avenue, and buildings extending to and over the water have been erected on these lots. All the building before mentioned has been done with the knowledge of the plaintiff, who made no objection until this proceeding was begun. As to these, he now concedes he is estopped to claim the way. Lake Shore avenue has never been wrought. It is rocky and precipitous in places, and it would not be practicable to use it except for a footway. A large part of the land has not been sold by the lot, and there are but few houses on the tract.

After the execution sale, the plaintiff bought two more lots (Nos. 2 and 46) of the defendant company. Lot 2 bounds upon a public highway, and lot 46 is separated from the same highway by one lot which is owned by the plaintiff. The deeds describe the lots by courses and distances, and "as shown on the plan of the Winnipesaukee Land Company, recorded in Belknap County Records." Being doubtful as to the title to lot 2, the plaintiff obtained a confirmatory deed thereof from the Russells; and, when he took this deed, he was informed by them that they owned the land between the railroad and the lake, and would do as they saw fit with the proposed streets and avenues. It was understood between them that the conveyances of these two lots "had no effect upon the land below." If the plaintiff has rights in the streets which the defendants cannot deprive him of, the prayer of the bill is to be granted.

PEASLEE, J. The proposition that the plaintiff has rights in the streets which the defendants cannot deprive him of is well established. Walker v. Manchester, 58 N. H. 438; Bartlett v. Bangor, 67 Me. 460; Van O'Linda v. Lothrop, 21 Pick. (Mass.) 292, 32 Am. Dec. 261; New England, etc., Co. v. Everett Distilling Co., 189 Mass. 145, 75 N. E. 85; Chapin v. Brown, 15 R. I. 579, 10 Atl. 639; Lord v. Atkins, 138 N. Y. 184, 33 N. E. 1035; Lenning v. Association, 41 N. J. Eq. 606, 7 Atl. 491, 56 Am. Rep. 16. Riedinger v. Railroad, 62 Mich. 29, 28 N. W. 775. Thus far the authorities are unanimous. As the case is transferred, this entitles the plaintiff to the injunction as prayed for. But it is manifest that other questions are involved in this controversy. They have been argued by counsel, and their consideration is necessary in an equitable determination of the rights involved. These questions are: (1) To what streets do the plaintiff's rights extend? (2) To what lots are they incident? (3) Does a right exist along the shore line where the land is narrower than is shown upon the plan?

1. The plaintiff insists that as incident to each lot he purchased by the plan he acquired a right to use every street shown upon the entire tract. While cases are to be found which support this hard and fast rule, it cannot be sustained upon principle. The right is not based upon a covenant that the ways exist. Howe v. Alger, 4 Allen (Mass.) 206. It arises merely by way of estoppel. The time came when the grantor could no longer deny that streets existed as represented on the plan. "That time was when purchasers of lands, upon a consideration enhanced by the inducements held out by the proclamation of these landholders, acquired such rights with reference to their house lots thus purchased, and the convenient and indispensable enjoyment of them, as would render it fraudulent on the part of the vendors to revoke their agreement by changing or abolishing the location of the streets laid down on their recorded plan, with reference to which their sales and conveyances had been made." Walker v. Manchester, 58 N. H. 438, 441. Since this is the foundation of the right here involved, it follows that all the elements of an estoppel by conduct must exist. One of these elements is that the representation made must be material to the action about to be taken. If the representation is immaterial, there is no estoppel. Comings v. Wellman, 14 N. H. 287, 292;

Stevens v. Dennett, 51 N. H. 324, 333. The true rule, then, is that there is an estoppel to deny the existence of the ways shown upon the plan so far, and so far only, as the existence of the ways would be material to the owner of the land purchased. "In some cases it is held that the purchaser of a lot described as bounded on a street or way is entitled to have it kept open for the whole distance shown by the plat or description; but the decision in every case has been based upon substantial equities. It could not have been otherwise; for estoppels arise upon equities, and are enforced for their protection." Cooley, J., in Bell v. Todd, 51 Mich. 21, 16 N. W. 304. How far the lay-out of the whole tract into some 200 lots concerns the purchaser of an individual lot is a question of fact, to be settled in the superior court. In the language above quoted the relation must be such as to create substantial equities before the relief here sought can be granted.

2. As the rights in the streets may extend farther for one lot than for another, it is necessary to determine whether the plaintiff can maintain this proceeding as to lands purchased from the defendant company, the deeds to which refer to the Winnipesaukee Company's plan. At the time the confirmatory deed to lot 2 was given, the plaintiff was told that the Russells owned all the unsold lots lying between the railroad and the lake, and that they would do with the proposed streets as they saw fit. The parties then understood the deeds of lots 2 and 46 did not affect the title to "the lands below." It is understood that this refers to the land north of the railroad. In view of these facts, it seems plain that as to lots 2 and 46 no case for equitable relief is made out so far as the streets north of the railroad are involved. What the result might be if the plaintiff conveyed to an innocent third party, who relied upon the representations contained in the deeds from the defendants to the plaintiff, is a question not involved here. The plaintiff could not have relied thereon, and as to him there is no estoppel.

The land south of the railroad was not owned by the Russells; and, unless it appears that they purpose to interfere with the plaintiff's rights therein, no case is made against them as to that tract. This land was, however, owned by the defendant land company. By its reference thereto in its deeds as "shown on the plan of the Winnipesaukee Land Company, recorded in the

Belknap county records," it represented that the lands were laid out according to that plan as effectively as though it had also caused the plan to be made and recorded in the first instance. Having made this representation, it is equitably bound to refrain from doing any act in contradiction of the inducements to the contract. As the company denies the right to use the ways as laid out, the plaintiff is entitled to his injunction so far as his interest is established.

The question whether the original laying out of the tract, recording the plan, and selling lots thereby constituted an incipient dedication of the streets to public uses is not involved in the present proceeding. If an offer of these streets to the public has been made and is still outstanding, it has not as yet been accepted by those who represent the public. P. S. 1901, c. 67, § 1. The most that could be said would be that an offer is open, and may be accepted or rejected.

3. The plan delineates Lake Shore avenue as following the marginal line of the lake. This line is a definite boundary, and takes precedence over mere courses and distances. Kent v. Taylor, 64 N. H. 489, 13 Atl. 419, and cases cited. The lines of the interior lots shown upon the plan are of the latter class. There was no such land as these lines, or a part of them, indicate. The way is not affected by the fact that a mistake was made as to the quantity of land lying between the lake and the railroad. The plaintiff's lots in right of which a decree is to be entered were all sold before there was any attempt to sell by descriptions which conflict with the existence of the avenue. The most casual inspection of the plan shows an intent that there be a continuous way along the lake front. It would so appear to prospective purchasers of lots. Whether this intent might have been abandoned by a sale of the shore before private rights in the avenue had attached is a question not presented in this case.

The fact that a portion or the whole of the avenue can be used only for a footpath is not necessarily fatal to the plaintiff's claims therein. This tract was laid out for a summer colony, and a footpath along a rugged shore might well be thought to be of value to each cottager. It might even be considered to be of greater value from the fact that it could never be intruded upon by vehicular travel.

It follows from all these considerations that the decree to be entered may not be as broad as the prayer of the bill. It is a question to be settled by a consideration of all the equities of the situation. How far each lot is affected must be determined in the superior court. So far as the plaintiff's lots which were purchased in reliance upon the plan (or any of them) are found to be affected by the general scheme or by particular ways shown upon the plan, he is entitled to be protected by a decree.

Case discharged. All concurred.

CHAPTER LIX.

POWERS.

Defective Execution.

COATES v. LUNT ET AL.

210 Mass. 314, 96 N. E. 685. 1911.

Appeal from Supreme Judicial Court, Essex County.

Suit by Margaret S. Coates, as trustee, against Ezra Lunt and others. From a decree sustaining a demurrer and dismissing the bill, complainant appeals. Reversed.

RUGG, C. J. This is an appeal from a decree sustaining a demurrer and dismissing a bill in equity. The bill alleges that Mary S. Greenleaf by will devised real estate to her two daughters, Ellen M. Carter and Sarah C. Lunt, and the survivor of them, in trust, to apply the net income thereof "to their own use and enjoyment in equal proportions during their natural lives, but should they or either of them by reason of misfortune need more than the net income thereof or her share thereof for their or her comfortable maintenance, in such case I hereby authorize and empower them as my trustees under this my will to sell and convey by good and sufficient deeds, * * * by public or private sales, for such sums of money and to such person or persons as they may decide upon, any and all my real estate," with remainder of income, upon the decease of either, to her children, and remainder after decease of both to their children. During the lives of the daughters, Sarah "by reason of misfortune needed more than the income of the estate," and the daughters decided that they needed to sell one undivided fourth part of certain real estate for her support. To carry out this purpose, the daughter Ellen paid to her sister Sarah $1,250 for said interest, which was a fair price, and received from her an instrument of the following tenor:

"Newburyport.

"I have received $1,250 from Ellen M. Carter in payment for the quarter interest in store number 32 Market Square which I own and relinquish to her.

her
"Witness, Jan. 17, 1905: "Sarah X Lunt.
mark

"Margaret S. Coates.
"Mary F. Collins."

Thereupon Ellen had the use and enjoyment of the income of this quarter interest, and paid the repairs, insurance and taxes during her life. The bill further alleges that the writing was intended by the two daughters "as a valid and binding execution of the power in said * * * will * * * and was intended by and supposed by them to legally vest the title thereto in said Ellen M. Carter." Both daughters are now deceased, and this suit is brought by the trustee under the will of Ellen M. Carter against the children of Sarah C. Lunt, praying for a conveyance in due form of the undivided fourth of real estate described in the instrument.

It is plain that the will conferred upon the daughters as trustees ample power to convey the fee to the real estate, provided the income was insufficient for the support of either, and it became necessary to sell for their comfort, and they were made the judges of the necessity. Under the allegations of the bill, which in this discussion must be taken to be true, occasion existed for the exercise of the power, and it would have been possible for the trustees by proper instrument to have made a sale. The bill alleges an intent on the part of the trustees to exercise the power and a belief on their part that the paper signed by Sarah was a complete execution of the power, and a surrender of possession by Sarah to Ellen, who thereupon entered into control and exercised the functions of ownership over the estate during her life. Relief in equity is sought to perfect an execution of the power. Defective execution of power constitutes a ground for equitable relief. The elements necessary for its exercise are that there should be a fixed intent to execute the power upon a sufficient consideration and an attempt to effectuate that intent, partial in its nature and falling short of

accomplishing the purpose by reason of some defect in the instrument by which the attempt is made. Where these elements exist equity will compel complete performance of the power, provided no rights of other persons with superior equities have intervened.

All these elements and more are alleged in the case at bar. The necessities of the daughter Sarah required the execution of the power. There was an intent on the part of both the daughters to exercise the right of sale conferred by the will. The fair value of the property was paid by testatrix of the plaintiff to her sister. There was executed and delivered an instrument which contained a description of the property sufficient for identification, and which, read in the light of the conditions under which it was executed and delivered, shows on its face, although in language of extreme informality, a belief that it constituted an execution of the power. The rational construction to give the instrument is that it manifests an intent to convey the fee of the property which could be conveyed only in execution of the power. It is difficult to attach any intelligent meaning to it except an attempt to execute the power. This interpretation is confirmed by the circumstances alleged, especially by the payment of a fair purchase price and by a change of possession and by an entry into occupation followed by the usual acts of ownership. Although the instrument is signed by only one of the daughters, and it may be assumed that a strictly legal execution of the power would have required the signature of both as the trustees (Morville v. Fowle, 144 Mass. 109, 10 N. E. 766), yet in equity the allegation that both intended it to constitute an execution of the power and supposed that it was such is sufficient. The omission and incompleteness of this instrument are not of such a nature as negative the inference that it was intended and assumed by all the parties to operate as a complete execution. Hence there is no reason to deny equitable relief.

The children of Sarah C. Lunt were given a vested remainder under the will of the testatrix, but it was liable to be divested by the exercise of the power for the purpose set forth in the will. Their rights as devisees were subject wholly to the necessities of either or both of the donees of the power. The written instrument was not a mere contract to execute a power at some

time in the future, but was itself the evidence of an attempted execution of the power. Therefore, the bill shows no equity in the remaindermen superior but in truth one subsidiary to that alleged to exist in the petitioner.

It is urged that the attempted execution of the power, being by one of the trustees to the other, is obnoxious to the well-settled rule that no one can be the purchaser of property held by him in a fiduciary capacity. But the donees of the power were not merely trustees, they were also the chief beneficiaries. When the occasion arose for the exercise of the power, the one whose necessities were thereby to be relieved became as to the share to be sold the sole beneficiary. There is no rule which prevents a trustee from dealing directly with the cestui que trust. If the transaction is fair and open and no advantage is taken, it will be upheld. Brown v. Cowell, 116 Mass. 461. The allegations of the bill are within this principle.

The statute of frauds is not applicable to the case of an executed contract. But even if that defense was open, the description signed by Mrs. Lunt was ample to satisfy the requirements of that act. The demurrer should have been overruled.

Decree reversed.

Estoppel of Donee.

LANGLEY v. CONLAN ET AL.

212 Mass. 135, 98 N. E. 1064. 1912.

Report from Supreme Judicial Court, Middlesex County.

Writ of entry by Lauren F. Langley against Sarah A. Conlan and another to recover land alleged by demandant to be held in fee by him. Cause reported to Supreme Judicial Court. Judgment entered for demandant.

RUGG, C. J. This is a writ of entry to recover land claimed in fee by the demandant. John O. Langley died leaving a will, duly proved and allowed in 1872, by which he gave the demanded premises to a trustee to hold for the benefit of his daughter, Eliza J. Langley, for her life, authorizing the trustee in his discretion for the benefit of his daughter Eliza to sell the real

estate, and empowering her to dispose of it by will. No disposition was made of it in case she failed to dispose of it by will. The only heirs at law of the testator were two daughters, Eliza and Mary. The trustee named in the will declined to accept, and the daughter Eliza was appointed administratrix with the will annexed in 1872, rendering her final account as such in 1874. By mortgage deed containing full covenants dated December 7, 1900, and duly recorded, Eliza conveyed the premises in mortgage to the demandant to secure her note for $1,100. In November, 1901, Eliza acquired whatever title had vested in her sister at the death of the testator, and was appointed and qualified as first trustee under his will. In 1902 she resigned, and one Barlow was appointed trustee in her stead, who as such trustee conveyed the demanded premises to the defendant Conlan in October, 1902. In November, 1902, the demandant made entry on the demanded premises to foreclose his mortgage for breach of its condition, and duly recorded certificate thereof. In 1903 Eliza J. Langley died, leaving a will dated September 25, 1902, which was duly allowed, and by which she devised the demanded premises to the tenants, Conlan and one McAleer, whose administrator is joined in this writ.

The question is whether the demandant makes out a title on these facts. The first point to be considered is the execution of the power conferred upon Eliza J. Langley by the will of her father to dispose of the premises by will. It has been decided that a voluntary appointment made in execution of a general power is not good against creditors, and that by such appointment the property appointed becomes in equity a part of his assets. Clapp v. Ingraham, 126 Mass. 200; Tuell v. Hurley, 206 Mass. 65, 67, 91 N. E. 1013. The question has never arisen in this commonwealth whether the donee of a power can be estopped from a voluntary exercise of the power. But it seems to follow from the decisions just cited. It is only consonant with principles of fair dealing and common sense that any conduct by the donee of a power which in good faith precludes him from making an appointment should have the effect of an estoppel. Any dealing with the estate by the donee of the power inconsistent with its exercise by which the rights of others are affected puts an end to the power. It has been so held in other jurisdictions. In re Hancock, 1906 (C. A.) 1 Ch. 173; Foakes

v. Jackson [1900] 1 Ch. 807; Leggett v. Doremus, 25 N. J. Eq. 122, 127; Brown v. Renshaw, 57 Md. 67, 79; Grosvenor v. Bowen, 15 R. I. 549, 10 Atl. 589. This principle prevails notwithstanding the general rule that appointees by exercise of a power take, not through the person making the appointment, but through the donor of the power. Where the execution of the power is voluntary on the part of the donee, his conduct may be such as to prevent the exercise of the power. This is such a case. Eliza J. Langley made conveyance in mortgage with full covenants of warranty to the demandant. She received for her own use the consideration of the mortgage. It is hard to conceive of conduct more decisively indicating in good faith a promise not to exercise the appointment to the prejudice of the mortgagee. It follows that the appointees under the will of Eliza J. Langley have no title in the demanded premises.

B. DURING LIFE WITHOUT CONSENT OF OWNER

CHAPTER LX.

IN GENERAL.

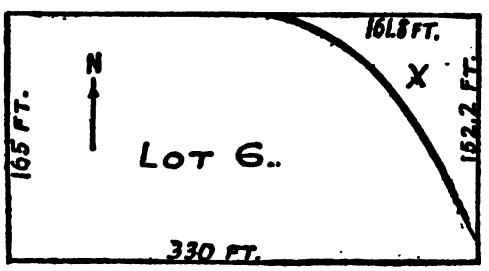
Tax Titles.

OREGON SHORT LINE R. R. CO. v. HALLOCK ET AL.

126 Pac. 394 (Utah). 1912.

Action by the Oregon Short Line Railroad Company against E. S. Hallock and another. From the judgment, plaintiff appeals. Reversed, with directions.

FRICK, C. J. On the 21st day of October, 1905, appellant commenced this action to quiet the title to a part of lot 6, block 81, plat A, Salt Lake City survey. The portion of lot 6 in question is the portion marked "X" in the following plat:



The material and undisputed facts, in substance, are: That in June, 1902, appellant commenced a proceeding under our statute in the district court of Salt Lake county against the owners of said lot 6 to condemn that portion thereof marked "X" on the foregoing plat; that when the proceedings were commenced an order was made by said court, which permitted appellant to take possession of the portion sought to be con-

demned, which it did; that subsequently, on the 26th day of April, 1904, said court entered its final order or judgment in condemnation, and on payment by appellant of the sum of $13,000, in the language of the decree "as compensation for the land taken and damages sustained by the defendants to the remaining portion of the said land," the title to the portion marked "X" was by said judgment vested in appellant, and it has used the same continuously for railroad purposes; that at the time said condemnation proceedings were commenced, and when said judgment of condemnation was entered, and ever since the year 1900, and, perhaps, for some time prior thereto, all of said lot 6 was owned in common, undivided and unpartitioned, by the heirs of one Samuel Russell, deceased; that in the years 1901 and 1902 all of lot 6 was assessed in the name of "Samuel P. Russell et al."; that said Samuel P. Russell is one of the heirs aforesaid, and was the owner of an undivided two thirty-thirds of said lot 6; that the taxes for said years of 1901 and 1902 remained unpaid, and the said respondent E. S. Hallock purchased said lot 6 at tax sale from the county treasurer of Salt Lake county, and received a certificate of sale from him.

It has often been held that mere irregularities are insufficient to invalidate an assessment and levy of taxes, when the same are assailed in an action like the one at bar. The law which controls the courts in such actions is well stated by the author in Black on Tax Titles (section 442) in the following words: "The maxim, 'He that seeks equity must do equity,' requires that a party seeking to have a tax deed set aside as a cloud upon his title to real estate must offer to repay to the purchaser the amount of all taxes and costs paid by him which were a just and legal charge upon the land, with interest; and it is error to set aside a tax sale for mere irregularities, not affecting the substantial justice of the tax, without requiring such payment. And, further, it is not enough to decree that such repayment be made; but the court should make it a condition precedent to setting aside the tax deed." A large number of cases in support of the foregoing text are cited by Mr. Black in a footnote, to which we refer the reader without specially citing the cases here.

The contentions, therefore, that the court erred in overruling appellant's objections to the admission of evidence, and that it

erred in finding that lot 6 was properly assessed for taxation, and that the taxes in controversy were properly levied for the years aforesaid, cannot be sustained.

The serious question in the case, however, is whether the conclusions of law and judgment are supported by the undisputed facts. As we have pointed out, lot 6 was assessed as one parcel, upon which the taxes for the years in question were levied before final judgment in condemnation was entered in favor of appellant. Respondents' counsel therefore contend that the appellant obtained title to that portion of lot 6 marked "X" by virtue of the judgment of condemnation, and that the title was "subject to such liens or incumbrances as were legally attached to the property." If, for the purposes of this case, counsel's statements be assumed to be correct, yet the question remains to be answered whether that portion of lot 6 which was condemned, and the title to which passed to appellant, can be burdened with the entire tax that was levied upon the whole of said lot for the years aforesaid.

By virtue of Comp. Laws of 1907, § 2597, the tax in question became a lien against the whole of lot 6 from the first Monday in January of each year; and by virtue of section 2595 such a lien was in legal effect a judgment, which continues in force until the taxes are paid. When the respondents purchased the property at the tax sale, the lien passed to them by virtue of the law of subrogation; and thus, when appellant obtained title to that portion of lot 6 marked "X," respondents were lienholders, and, under the provisions of Comp. Laws 1907, § 3595, could either have been made parties to the condemnation proceedings by appellant, or could have voluntarily intervened in said proceeding at any time before final judgment, whether they were made parties or not. Had respondents been made parties to the condemnation proceedings, or had they intervened therein, they, under the general rules of law, could have had their liens established and the amounts thereof ascertained. Had this been done, the court, no doubt, would have required the owners of the condemned property to discharge such liens out of the fund which appellant was required to pay as compensation and damages for the property taken and damaged. See 2 Lewis, Eminent Domain (3d Ed.) §§ 524 and 540.

The fact, however, that respondents were neither made par-

ties, nor intervened in the condemnation proceedings, did not deprive them of their liens nor of their right to redress. See same author and volume, § 897. If, however, respondents suffered no injury by not being parties to the condemnation proceedings, they likewise cannot, by reason thereof gain an advantage as against appellant. Having therefore neither gained nor lost any rights as against appellant, what are the rights of respondents in this proceeding?

Ordinarily where there are liens against property, of which a portion only is condemned, the liens are shifted onto that portion which is not condemned, to the extent, at least, that the portion condemned is held only for the deficiency, if any, in case the proceeds derived from a sale of the portion not condemned are insufficient to pay off the liens. Houck v. Gue, 30 Neb. 113, 46 N. W. 280. The mere fact that a part of lot 6 was taken by condemnation proceedings, rather than voluntarily alienated by the owners, does not change the general rule that the portion which is unsold or retained by the owners is burdened with the lien to the extent aforesaid. Severin v. B. C. R. & N. Ry. Co., 38 Iowa, 463.

In the case at bar, we are, however, not required to pass upon the question just discussed, for the reason that appellant seemingly does not dispute respondents' contention that the title to that portion of lot 6 marked "X" passed to appellant, "subject to such liens or incumbrances as were legally attached to the property" condemned, and that the unpaid taxes, if legally assessed and levied, constituted a lien against all of lot 6. All that appellant contends for is that the court erred in charging the whole of the taxes levied against lot 6 upon that portion thereof which was condemned by it. The question we are called on to pass upon is therefore limited to the contention just stated. In our judgment, this case comes within the rule laid down by the Supreme Court of Nebraska, in the case of State v. M. P. R. Co., 75 Neb. 4, 105 N. W. 983. In that case it was held that the unpaid taxes constituted a lien against the whole property, and that the railroad company, in failing to make the person claiming the lien a party to the condemnation proceedings, took the property subject to such lien. But it is not held in that case, nor have counsel for respondents cited any, and we have found none, wherein it is held that, where a portion is severed by con-

demnation proceedings from an entire tract, the portion so severed and condemned can be charged with the taxes levied against the whole tract.

The undisputed facts in the case at bar are that lot 6 is a large lot containing 1¼ acres; that the portion condemned contains less than one-fourth of an acre, and thus contains less than one-fifth of the whole of lot 6. The record discloses no reason why the condemned portion of lot 6 should be charged with more than its proportion of the taxes, according to the area contained in that portion when compared with the area contained in the whole of lot 6. Nor is there anything to show why the uncondemned portion of lot 6 is not ample security for its portion of the taxes, being approximately four-fifths of the whole taxes.

We are of the opinion that, under the undisputed facts and the peculiar circumstances of this case, the appellant should be required to pay such proportion of the whole tax remaining unpaid as the area of that portion of lot 6 which was condemned bears to the whole area of said lot. The facts were all before the trial court; and it is an easy matter for that court either to make, or require someone to make, a computation of the exact amount of the unpaid taxes, interest, and costs that appellant should pay upon the portion of lot 6 marked "X." Whatever fraction of the whole of lot 6 the condemned portion amounts to, the same proportion or fraction of the whole of the taxes, interest, and costs should be charged against the portion marked "X." Before the final judgment of condemnation, the title to lot 6 was in the heirs of Samuel Russell, deceased, and, ordinarily, they should have paid the taxes upon what was their own. If it be contended, however, that, in view that appellant was in possession and was using the property, therefore it should have paid the taxes, the answer is again obvious, namely, that in any event, under any rule that may be applied, it was only required to pay the taxes upon that portion of which it was in possession, and not also upon that which was owned and in possession of the heirs.

It may be that if appellant had made the respondents parties to the condemnation proceedings that the amount they had advanced for taxes would have been ordered paid out of the condemnation and damage money which was paid to the owners

of lot 6. Such an order cannot now be made, because appellant voluntarily paid the money to the heirs as owners of the property condemned and damaged. The unpaid taxes thus remained a subsisting lien against the whole of lot 6; and for the reasons already stated, we have no alternative save to require appellant to pay the proportion of the taxes which are a lien upon that part of lot 6 which it has condemned.

The judgment, for the purpose of being modified, is therefore reversed, and the conclusions of law, so far as they are in conflict with the views herein expressed, are vacated and set aside. The court is directed to ascertain the exact area that appellant has condemned from lot 6, aforesaid, as compared with the area of the whole of said lot; to make conclusions of law in conformity with the views herein expressed; to enter judgment requiring the appellant to pay into court, within a reasonable time to be fixed by the court, the proportion of the whole tax that the area condemned bears to the area of lot 6, as hereinbefore indicated; and, in case appellant shall within said time pay, or cause to be paid, into court the amount fixed and determined by the court, as aforesaid, with the accrued interest and costs, then, and in such event, the court shall enter a judgment quieting the title to that portion of lot 6 marked "X" in appellant; and in case appellant fails to comply with the orders and judgment of the court, as aforesaid, the court shall either dismiss its complaint at its costs, or, in lien thereof, may order that that portion of lot 6 marked "X" be sold, and the proceeds of the sale applied as follows: (1) To the payment of that portion of the whole tax, interest, and costs which is found to be a lien upon the portion of lot 6 marked "X"; and (2) to pay the remainder, if any, to appellant. Neither party to recover costs on appeal.

McCARTY and STRAUP, JJ., concur.

CHAPTER LXII.

SALES ON EXECUTION.

KEATON v. FARKAS.

136 Ga. 188, 70 S. E. 1110. 1911.

Error from Superior Court, Dougherty County; Frank Park, Judge.

Action by W. C. Keaton against Sam Farkas. Judgment for defendant, and plaintiff brings error. Affirmed.

LUMPKIN, J. In 1867 B. O. Keaton by deed of gift conveyed certain land to his son, J. K. P. Keaton, in trust for the use of the grantee and such children as might be born to him for and during his life, "and at his death remainder over to such child or children as he may have living at his death and born within the usual period of gestation thereafter, forever, in fee simple." The plaintiff claims as the surviving child of the grantee. When the deed was made, there was an outstanding execution against the donor. It was levied on the land. The grantee interposed a claim, but subsequently withdrew it. Again he made a claim, and again he withdrew it. Thus some years were consumed. Finally the land was sold at sheriff's sale, and a sheriff's deed made to one Jackson. Six years later he conveyed to J. K. P. Keaton, who made a conveyance to secure a loan. Judgment was recovered on the secured debt, and under the execution issued thereon the land was sold. Two days later the purchaser conveyed to J. K. P. Keaton, as trustee for the present plaintiff, with power in the trustee to sell at private sale. This power was exercised, and the land was sold and conveyed to the present defendant. He held for about 19 years before suit was brought. J. K. P. Keaton died in 1903, and in 1909 the plaintiff brought an action of complaint for land against the defendant, claiming as remainderman under the deed from B. O. Keaton to J. K. P. Keaton. On the trial the

court directed a verdict for the defendant. The plaintiff moved for a new trial, which was refused, and he excepted.

This was an effort to derive a live title from a defunct deed. There was an execution outstanding against the owner of the land when he made a deed of gift to his son, as trustee for himself and children, with remainder to those who might survive him. The property was subject to the execution, and the sale under it, if valid, destroyed the effect of the deed of gift. The defendant claimed by virtue of that sale and a chain of title under it. There was no conflict in the evidence as to the fact that he was a bona fide purchaser for value, or that he had no notice of any trust under the deed made by B. O. Keaton. There was a clause in the sheriff's deed to Jackson as follows: "The terms of the bond made this day between Jackson and Keaton explain the transfer of Keaton's bid to Jackson for the property at sheriff's sale." The bond was not introduced in evidence, nor were its contents proved. There was nothing in this clause, on its face, to show anything more than that Keaton had transferred his bid to Jackson, and that Jackson made him a bond for title to convey the place upon certain agreed terms. There was no hint of, or reference to, any deed of gift made by B. O. Keaton.

The facts that about six years later Jackson conveyed the land to J. K. P. Keaton, and that the latter subsequently impressed it with a trust in favor of his son, the present plaintiff, but with the right in himself, as trustee, to sell, did not operate to revive the original deed of gift, or the trust provided by it, and thus affect a bona fide purchaser from him under the power contained in the last deed, for value, and without notice of any equity, if any existed. This is true, whether the trustee under the original deed held in trust only for certain beneficiaries during the life of J. K. P. Keaton, or was also trustee for the remaindermen.

The decisions in Keaton v. Baggs & Stephens, 53 Ga. 226, Pettyjohn v. Liebscher, 92 Ga. 149, 17 S. E. 1007, and Bourquin v. Bourquin, 120 Ga. 115, 47 S. E. 639, are not applicable to the present case. In each of them the claim sought to be enforced was against the trustee or the trust estate, and one which it was the duty of the trustee to pay, or against which he should have sought to protect the estate. Here the execution was not against the trust estate, but against the maker of the trust deed, and

was superior to such conveyance. Moreover, this was an action of complaint for land, not an equitable proceeding to set aside a sale or enforce a trust.

Objection was interposed to the introduction of the sheriff's deed to Jackson, on the ground that the entry of levy on the fi. fa. did not state that the tenant in possession was notified of such levy, and also on the ground that the deed showed on its face that it was not a regular and legal sheriff's deed. The entry of levy on land constitutes the levy. Isam v. Hooks, 46 Ga. 309 (2).

Civil Code 1910, § 6031, requires notice of the levy to be given to the tenant in possession within five days after the levy is made. It is therefore clear that the entry of levy would not be void, because it did not include within itself a statement that the tenant had been notified of it.

The sheriff may make a deed to the transferee of the person making the highest and best bid at the sale. Parler v. Johnson, 81 Ga. 254, 7 S. E. 317. It furnished no ground for objection to the admission of the sheriff's deed that it showed on its face that it was made to a transferee; and the insertion of the clause above quoted in the deed did not destroy its efficacy as a sheriff's deed, or cause it to be inadmissible in evidence. There was no error in directing a verdict for the defendant.

Judgment affirmed. All the Justices concur.

CHAPTER LXIV.

ADVERSE POSSESSION.

Abandonment of Title by Adverse Possession.

HOOPER v. LEAVITT.

(See page 836.)

Possession Must Be Open.

LOCKLEAR v. SAVAGE ET AL.

74 S. E. 347 (N. C.). 1912.

Appeal from Superior Court, Robeson County; Whedbee, Judge. Action by Katie Ann Locklear, Administratrix, against W. A. Savage and others. From a judgment for defendants, plaintiff appeals. Reversed, and new trial granted.

WALKER, J. This is an action to recover damages for a trespass on land, in cutting and removing timber therefrom. The plaintiff claims title under John Locklear, being his administratrix. It is not pretended that he had any paper title for the land, or color of title; but to show title in him the plaintiff relied solely upon John Locklear's adverse possession of the land for more than 30 years, under a claim of right, to take the title out of the state and vest it in him, and the real question in the case is whether he had such a possession of the land for a sufficient length of time to produce that result.

What is "adverse possession" within the meaning of the law has been well settled by our decisions. It consists in actual possession, with an intent to hold solely for the possessor to the exclusion of others, and is denoted by the exercises of acts of dominion over the land, in making the ordinary use and taking the ordinary profits of which it is susceptible in its present state; such acts to be so repeated as to show that they are done in the character of owner, in opposition to right or claim of any other person, and not merely as an occasional trespasser.

It must be decided and notorious as the nature of the land will permit, affording unequivocal indication to all persons that he is exercising thereon the dominion of owner. Loftin v. Cobb, 46 N. C. 406, 62 Am. Dec. 173; Montgomery v. Wynns, 20 N. C. 667; Williams v. Buchanan, 23 N. C. 535, 35 Am. Dec. 760; Burton v. Carruth, 18 N. C. 2; Gilchrist v. McLaughlin, 29 N. C. 310; Bynum v. Carter, 26 N. C. 310; Simpson v. Blount, 14 N. C. 34; Tredwell v. Riddick, 23 N. C. 56. So in Loftin v. Cobb, supra, it was held that cutting timber and making shingles in a swamp unfit for cultivation, continuously for seven years, is a good possession under the statute. "It is exercising that dominion over the thing and taking that use and profit which it is capable of yielding in its present state. It is all that can be done until the subject shall be changed. It is like the case stated in the books of cutting rushes from a marsh. This is sufficient, though it might appear that dykes and banks would make the marsh arable." Again, it was held in Williams v. Buchanan, 23 N. C. 535, 35 Am. Dec. 760, that, as to a stream not navigable, keeping up fish traps therein, erecting and repairing dams across it, and using it every year during the entire fishing season for the purpose of catching fish, constitute an unequivocal possession thereof.

The possession must, of course, be not only adverse, as we have defined it, but open, notorious, and continuous, and the extent of it must be shown by known and visible boundaries. The doctrine was explained and illustrated in the recent case of Coxe v. Carpenter, 157 N. C. 557, 73 S. E. 113, in which we said, referring to the evidence in that case: "The jury may well infer that these acts were those of ownership, and not those of an occasional trespasser; and that they were repeated and continuous for a considerable period of time. The possession was as decided and notorious as the nature of the land would permit, and offered unequivocal indication that plantiff and his father were exercising the dominion of owners, and were not pillaging as trespassers. Williams v. Buchanan, 23 N. C. 535, 35 Am. Dec. 760; Tredwell v. Reddick, 23 N. C. 56; Hamilton v. Icard, 114 N. C. 538, 19 S. E. 607; Simpson v. Blount, 14 N. C. 34; Baum v. Shooting Club, 96 N. C. 310, 2 S. E. 673. It is true that, in proving continuous adverse possession under color of title, nothing must be left to mere conjecture. The testimony

must tend to prove the continuity of possession for the statutory period, either in plain terms or by 'necessary implication.' Ruffin v. Overby, 105 N. C. 83, 11 S. E. 251. This possession need not be unceasing, but the evidence should be such as to warrant the inference that the actual use and occupation have extended over the required period, and that during it the claimant has, from time to time, continuously subjected the disputed land to the only use of which it was susceptible. Ruffin v. Overby, supra; McLean v. Smith, 106 N. C. 172, 11 S. E. 184; Hamilton v. Icard, supra. While the evidence offered is not necessarily conclusive, if taken to be true, as to the fact of possession, we think it is sufficient to be submitted to the jury, under appropriate instructions, that they may draw such inference as they see proper, bearing in mind that the burden of proof is on the plaintiff to establish the fact of possession for the statutory period by a preponderance in the proof." The evidence in this case may not be as strong as it was in the Coxe Case, but we are unable to say that there was absolutely none.

We are passing upon a judgment of nonsuit, and it is a familiar principle that the evidence is to be viewed in the light most favorable to the plaintiff.

The facts which the testimony tended to establish in support of the plaintiff's contention may be thus briefly stated: John Locklear was 80 years old when he died, and had lived on the land nearly all his life. He first built a hut on it, which was his home so long as fit for habitation. In 1853 he left this part of the land—the lower end—and built, on the same premises, at a different place and near the public road, the house in which he lived until 1897, the year of his death. He cleared and cultivated 10 or 15 acres of the land around his house, boxed the pine trees on the tract for turpentine, cut wood and cross-ties, ditched the land, and cut paths through it for the purpose of boxing the trees and cutting the timber. One witness testified: "I knew the bounds he worked up to and cultivated all of my lifetime—the lands where John Locklear lived. I can tell you the bounds." He then stated the names of the adjoining proprietors, and also that the land Locklear lived on and used was bounded by Batrix Bay, Mill Swamp, the Fayetteville and Lowrie roads. The turpentine boxes were cut and the trees "worked for turpentine" as far back as 35 years ago—about

1876. This suit was commenced April 9, 1910. There was also evidence that John Locklear had forbidden people to come upon the land for the purpose of boxing the trees, and driven them away on occasions at the point of his gun. There was much testimony of the kind we have stated, and some other facts and circumstances of more or less value in determining the character of the possession. There was evidence, it is true, tending to show that John Locklear's possession was not adverse or continuous; but upon a nonsuit we cannot consider it. It may be that the jury will find, upon the evidence now before us, or upon that and additional evidence at another trial, when the facts are more fully developed, and that there was neither an adverse nor a continuous possession. We must now infer everything from the testimony, in favor of the plaintiff, which it tends to prove.

This rule will not be the one for the guidance of the jury, when the issue of fact is submitted to them, but rather a contrary one, for the burden will then be upon the plaintiff to establish her case by a preponderance of the evidence. There is enough evidence in the record to carry the case to the jury, and the issue must be tried by them, under proper instructions of the court with reference to the real facts as they may find them to be.

Without stating it, we think there was some evidence to the effect that the defendants had cut timber from the land and sawed it into lumber, under such circumstances as to make them liable for the same, if John Locklear was the owner of the land.

The motion to dismiss the appeal because the exceptions are not grouped is overruled. There was only one exception, which was taken to the judgment of nonsuit, and the error is thus sufficiently assigned. We so decided at the last term. There is no irrelevant or superfluous matter in the record. On a motion to nonsuit, we must review the whole of the evidence. This should not be set out by question and answer, or by a full transcript of the stenographer's notes, but in narrative form.

On account of the peculiar nature of this appeal and the question presented, there has been no sufficient departure from the rules of this court and statutory provisions to call for an affirmance of the judgment without considering the case on appeal.

New trial.

Occupation by Mistake.

CLINCHFIELD COAL CO. ET AL. v. VIERS.

111 Va. 261, 68 S. E. 976. 1910.

Bill by H. H. Viers against the Clinchfield Coal Company and others. From a decree for complainant, defendants appeal. Reversed.

HARRISON, J. The bill in this case was filed by the appellee, H. H. Viers, asserting title to and possession of a strip of land containing 81.99 acres in the county of Dickenson, and alleging that, by reason of divers conveyances, the appellant Clinchfield Coal Company claimed to be the owner of the coal and minerals of said strip of land, and the appellants T. K. Colley and wife the owners of the surface thereof, and seeking to have the conveyances under which the appellants claimed set aside as alleged clouds upon his title. * * *

It is further claimed by the appellee that he has held adverse possession of the disputed strip of land for a sufficient length of time to acquire the legal title thereto as against the true owner.

It is only necessary to say in answer to this contention that the record clearly shows that the appellee never claimed title further north than the true Fugate line, and had no intention of claiming land that did not belong to him. The great weight of authority is in favor of the view that when the occupation of the land is by a mere mistake, and with no intention on the part of the occupant to claim as his own land which does not belong to him, but intends to claim only to the true line, wherever it may be, the holding is not adverse; the intention to hold adversely being an indispensable element of adverse possession. Schaubuch v. Dillemuth, 108 Va. 86, 60 S. E. 745.

For these reasons, the decree appealed from must be reversed, and this court will enter such decree as the circuit court ought to have entered, dismissing the appellee's bill with costs.

Reversed.

CHAPTER LXV.

ACCRETION, ALLUVION AND RELICTION.

Damages for Causing Alluvion.

FREELAND ET AL. v. PENNSYLVANIA R. R. CO.

197 Pa. St. 529, 47 Atl. 745. 1901.

Action by Charles Freeland and another against the Pennsylvania Railroad Company. Judgment for plaintiffs. Defendant appeals. Affirmed.

BROWN, J. The plaintiffs are riparian owners along the Juniata river, in Perry county. Their land, consisting of a farm of about 100 acres, is located on the north bank of the river, which naturally approaches it in a sort of semicircle form. The flow of the water as it comes down towards this land is southeast, until it reaches the apex of the bend, where, before the wrong complained of, it was deflected to the northeast, and then passed eastward along plaintiffs' property. Before the construction of the embankment by the appellant on the south bank of the river, which caused the injury to appellees, as found by the jury, there came, from immemorial time, with the flowing of the river and the swelling of its waters, deposits of valuable sand on plaintiffs' shore between high and low water marks. As certainly as "seedtime and harvest and cold and heat" did "not cease," these deposits never ceased, in season, so long as the stream flowed as was its wont. Its dashing current, in times of high water, after having passed the lowest point of the bend at Trimmer's Rock, became a gentle flow when it reached the shore of plaintiffs, from which the grains of sand settled and imperceptibly formed the alluvium at the bottom. In 1896 the Pennsylvania Railroad Company, in straightening its tracks at Trimmer's Rock, built an embankment, which occupies not only the bank of the river, but extends out over and beyond low-water mark. Since its completion the waters of the river,

in the recurring floods, no longer flow past plaintiffs' property in a gentle stream, but, encountering this artificial obstruction, are abruptly turned towards the north bank, and, instead of flowing, as from time out of mind before, along plaintiffs' shore, depositing the sand with which they had come freighted, they dash wildly on. The deposits have ceased, and, with the current of the stream so changed, it is now insisted, as found by the jury, that they will never return. With the loss of this sand, the plaintiffs are deprived of a revenue from the sale of it, which was as regular as the return from their crops; and the question on this appeal is whether the railroad company, having, by its obstruction of the natural flow of the river, deprived the owners of the farm of what they claim was its most valuable incident, must compensate them for the loss. In April, 1896, after the embankment had been built, there was the usual spring flood, and a large quantity of sand that had been deposited was swept away. The verdict of the jury in favor of the plaintiffs was not only for it, but for the loss of future deposits, their finding having been: "For sand bank carried away, $1,382.50; for destruction of the habit of the farm to gather future sand, $1,117.50."

The Juniata is a navigable river. From the original survey of April 28, 1765, down to the deed of March 9, 1829, to the father of appellees, who derive their title from him, every description of their farm gives the river, with its several courses, as a boundary; and their lands therefore run to its low-water mark. This has been so long settled, and is so generally known, that it is hardly necessary to cite the following: "Ever since the case of Carson v. Blazer, 2 Bin. 475, decided in 1810, it has been held in many cases that a survey, returned as bounded by a large navigable river, vests in the owner the right of soil to ordinary low-water mark of the stream, subject to the public right of passage for navigation, fishing, etc., in the stream, between ordinary high and low water mark. Variety in the language of the return matters little, so that the intention to make the stream a boundary appears sufficiently in the description and diagram. In determining this, both are taken together. The variety of expression in the decided cases is very great. * * * The result of the cases is that when a return of survey calls for a stream as its boundary, or to run by, along, up,

or down it, the title will run to the stream, and the marking of trees on the bank or margin of the stream to identify the lines run to the river, as well as the return, of courses and distances measured along the margin, necessarily to ascertain the quantity of land in the survey, will not restrain the title to the bank or margin only. As was said in Klingensmith v. Ground, 5 Watts, 458, a corner tree is not always to be had where it is wanted, and then the next most convenient must be taken; or, as in Ball v. Slack, 2 Whart. 508, a surveyor cannot run a curved line with compass, but, if a creek is returned as the line, there can be no mistake as to it, and the courses and distances along it are to be disregarded." Wood v. Appal, 63 Pa. St. 210. "Where a running stream is called for, it is always understood that the ownership extends to low-water mark, and so far has this been held in Pennsylvania that a traverse line has been held, technically, to pursue the meanders, so as to include the points that would otherwise be thrown out by it. Though the words 'near the creek,' strictly speaking, imply the existence of space betwixt the object immediately expressed and the object of reference beyond it, they indicate, in popular meaning, no more than the whereabout. Such is the general rule, and what is there to take the case out of it? If the words 'thence up the creek north' do not call for the creek as a boundary, why was the creek mentioned at all?" Klingensmith v. Ground, 5 Watts, 458. "In Pennsylvania, wherever a stream is navigable, and it is made the boundary of a grant by the state, the title passes to low-water mark, but no farther." Johns v. Davidson, 16 Pa. St. 512.

Though the title of a riparian owner to the soil extends to low-water mark, it is absolute only to high, and qualified as to what intervenes. Between high and low water he can use the land for his own private purposes, provided that in such use of it he does not interfere with the public rights of navigation, fishery, and improvement of the stream. "This being the navigable character of the stream [Allegheny], the rights of the riparian owners are settled by numerous decisions, a few of which may be referred to. Carson v. Blazer, supra; Shrunk v. Navigation Co., 14 Serg. & R. 71; Mall v. Slack, 2 Whart. 508; Zimmerman v. Canal Co., 1 Watts & S. 346; Bailey v. Miltenberger, 7 Casey, 37; McKeen v. Canal Co., 13 Wright (Pa.)

424; Fishing Co. v. Carter, 11 P. F. Smith, 21, opinion by Sharswood, J., decided last winter at Philadelphia. From these and other cases it will appear that the absolute title of the riparian proprietor extends to high-water mark only, and that between ordinary high and ordinary low water mark his title to the soil is qualified; it being subject to the public rights of navigation over it, and of improvement of the stream as a highway. He cannot occupy to the prejudice of navigation or cause obstructions to be placed upon the shore between these lines, without express authority of the state." Wainwright v. McCullough, 63 Pa. St. 66. "As between themselves, riparian owners are owners of the soil, and are bound to observe the obligations that grow out of their ownership and their proximity. In Zug v. Cob., 70 Pa. St. 138, it was held that an owner of the soil might use the river bed between high and lower water marks for his own private purposes, if he did not interfere with the rights of the public." Fulmer v. Williams, 122 Pa. St. 191, 15 Atl. 726, 1 L. R. A. 603. In the foregoing is found the clearly defined right of the appellees in the river bed between the high and low water marks. We are next led to the consideration of what the right was in the sand deposited there, which was swept away by the act of the defendant in changing the current of the stream.

"Alluvion" has been defined to be those accumulations of sand, earth, and loose stones or gravel brought down by rivers, which, when spread out to any extent form what is called "alluvial land." It is the addition made to land by the washing of the seas or rivers, and its characteristic is its imperceptible increase, so that it cannot be perceived how much is added in each moment of time. Ang. Water Courses (7th Ed.) 53. This is practically the definition of the sand or alluvium deposited on the plaintiffs' shore, and the right to it can be no less than that to alluvion, which is ownership in the owner of the land increased. Gould, Waters, 155; St. Clair Co. v. Lovingston, 23 Wall. 46, 23 L. Ed. 59; Kinzie v. Winston, 56 Ill. 56. That these deposits had not been allowed to accumulate and become a visible portion of the land of the appellees abutting on the river, but had been a valuable sediment on the shore between high and low water marks, cannot affect the rule that the accretions belong to the owner of the land. The owners here owned

it to low-water mark; the only qualification upon their right to the use of it between high and lower water being that no public right of navigation, fishery, or improvement should be interfered with. In removing the sand no such public right was affected, and the appellees took simply what belonged to them, as rightfully as the crops from their fields; the only difference being that in the one case they harvested after sowing, while in the other nature, without their aid, brought them increase.

This right to the sand was not only to it in situ, but, with the clearly-defined ownership of the appellees between high and low water marks, extended, as the learned trial judge properly held in his charge to the jury, to future deposits. "The riparian right to future alluvion is a vested right. It is an inherent and essential attribute of the original property. The title to the increment rests in the law of nature. It is the same with that of the owner of a tree to its fruits, and of the owner of flocks and herds to their natural increase. The right is a natural, not a civil, one. The maxim, 'Qui sentit onus debet sentire commodum,' lies at its foundation. The owner takes the chances of injury and of benefit arising from the situation of the property. If there be a gradual loss, he must bear it; if a gradual gain, it is his. The principle applies alike to streams that do, as to those that do not, overflow their banks; and where dikes and other defenses are, and where they are not, necessary to keep the water within its proper limits." St. Clair Co. v. Lovingston, 23 Wall. 46, 23 L. Ed. 59. Nothing need be added to these words of Mr. Justice Swayne.

The loss of the sand washed away and of the right to future alluvium having been caused by the defendant, it must compensate the appellees in damages. This liability cannot be evaded, whether the loss resulted from the appellants' exercise of the right of eminent domain, or from its act as a riparian owner.

The construction of the embankment by the railroad company was for the improvement of its own highway, and not of the Juniata river; and, if it was constructed under the right of eminent domain, liability to the party injured follows such exercise, to be enforced in trespass. Railway Co. v. Holland, 117 Pa. St. 613, 12 Atl. 575; Chester Co. v. Brower, 117 Pa. St.

647, 12 Atl. 577; Delaware Co.'s Appeal, 119 Pa. St. 159, 13 Atl. 62. If it acted simply as a riparian owner, it was bound by the rule, "Sic utere tuo ut alienum non lædas," disregard of which generally means not only injury to another, but liability for the wrong committed. "If a riparian owner places a structure upon his own land between high and low water marks that impedes navigation, he infringes the public right, and subjects himself to liability therefor. His ownership of the land over which the water flows along the shore will not relieve him from the consequence of his act, for his title to the shore is subject to the right of the public in the stream. If he places the structure in such manner as to throw the current against his neighbor's shore at such an angle as to wear it away and undermine and wash out his land, he inflicts a private injury upon his neighbor, for which a right to compensation exists. In the case of a private stream, no one would doubt the right of an injured owner to maintain an action for the damages suffered by him by reason of a change in the current. But one has no more right to injure another with the water of a navigable stream than with that of a nonnavigable private stream. It is not the character of the stream, but the character and consequences of the act of the owner of the shore, that determines the right of the injured party to compensation. As between themselves, riparian owners are owners of the soil, and are bound to observe the obligations that grow out of their ownership and their proximity. In Zug v. Com., 70 Pa. St. 138, it was held that an owner of the soil might use the river bed between high and low water marks for his own private purposes, if he did not interfere with the rights of the public. This declaration is, however, to be understood as qualified by the rule we have just considered,—that he must not, in the exercise of the right as a riparian owner, inflict injury upon his neighbors. This rule sets limits to the manner in which property of every description may be used, and is unaffected by the accident of location." Fulmer v. Williams, 122 Pa. St. 191, 15 Atl. 726, 1 L. R. A. 603.

The damage done to the land of appellees is permanent. Their sand has been washed away, and its value destroyed. The river no longer brings, nor will bring, alluvium to the shore, and the farm has lost its most valuable incident. The

instruction of the court as to the measure of damages was correct. It is true that, as to future alluvium, the finding of the jury was conjectural. It could not have been otherwise. But the plaintiffs' claim for it was substantial, and the verdict which cannot be said to be unreasonable, is their compensation for it. The assignments of error are all overruled, and the judgment is affirmed.

INDEX

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(The figures refer to those at the foot of the pages.)

Abstracts of Title, 430-436.
abstract offices, 430, 431.
duty of attorney in preparing, 430.
examination of title for, 431-433.
assessments of taxes, 435.
cloud on title, 432.
covenants in the deed, 432.
description of property, 431.
dower and curtesy interests, 432.
execution and acknowledgment, 432.
first name of party to whom property was deeded, 432.
heirs, number of, 433, 434.
liens, 431, 432, 434, 435.
mortgages, 434, 435.
probate proceedings, 433.
revenue stamps, when required, 432.
sales under execution, 435.
special assessments, 435.
tax titles, 435.
title passing on death, 433, 434.
tracing title from original grant, 431, 432.
guaranteed, 430.
importance of, 430.
liability of examiner of title, 435, 436.
Acceptance,
of deed, 421, 422, 424, 425.
by delivery to agent, 422.
of grantee, 422.
of grantor, 422.
by grantee, 424.
infant as grantee, 424.
delivered to third party for benefit of grantee, 421, 422.
necessity of, 424.
presumed where deed is recorded, 423.

Accretion,
defined, 535.
alluvion synonymous with, 535.
apparent, 535.
belongs to first owner, 535.
damages for loss of alluvion, 539.
division of flats, 540, 541.
effect of, by artificial structures, 538, 539.
extension of public street by, 541.
island,
arising in non-navigable river, belongs to whom, 539.
arising in the sea, belongs to occupier, 539.
caused by river changing its course, ownership does not change, 539, 540.
formed in private waters, belongs to owner of bed of water, 540.
latent, 535.
on shores of ponds, 540.
reliction distinguished from, 535, 536.
right to alluvion a vested right, 538.
rule as to, 536-538.
reasons for, 537, 538.
test of, 536.
where land submerged reappears and can be identified, 537.
Accumulation, 198-200.
direction for, which exceeds statutory period, how construed, 200.
forbidden by Parliament in reign of George III for any longer term than the life of the grantor or settlor, or twenty-one years from the death of any grantor or settlor, 199.
restricted by statute in many states, 199.
Thellusson Acts, 199.
Thellusson v. Woodford, 198, 199.
trust for, of rent during minority of tenants, void for remoteness, 202.
Adultery, persons living together in, do not constitute a family within the homestead exemption statutes, 292.
Adverse Possession,
actual possession necessary for, 520, 521, 523.
against,
grantee of an unrecorded deed, statute begins to run when, 525.
remainders and reversions, 526.
as between husband and wife, 271, 285, 525, 526.
as breach of covenant of warranty, 457, 458.
cannot run against estate of infant, when, 533, 534.
constructive possession under color of title, 519-524.
defined, 520.
actual possession of land necessary, 520, 521.
agency of relative for, 523, 524.
amount of land which can be claimed by, 522.
American rule, 522.

Adverse Possession, constructive possession—*Continued*
claim of ownership, 520.
color of title,
inheritable, 523.
will not embrace land of owner without notice, 522, 523.
paper title, nature of claim under, 521.
requisites of, 520, 521.
successive constructive possessions, effect of, on first occupier, 523.
deed by lessee, where purchaser remained in possession for over twenty years, effect of, 527, 528.
disabilities to adverse use, 533, 534.
disseisin by election, defined and explained, 525.
easement by prescription, 517-519. See also Easement, by prescription.
for twenty years against every claimant gives adverse user good title, 516.
ignorance of owner not sufficient to repel presumption of grant, 517.
interruptions to, 530-533.
defined, 531.
by entry of true owner, 530, 531.
by tenant insufficient, 532, 533.
mere protest not an interruption, 532.
stranger cannot make, 531.
knowledge of owner, 517.
nature of claim, 516, 517.
of land underneath projecting eaves, 524.
origin of title by prescription, 516.
possession under a void lease, when statutory period begins to run, 527.
prescription,
against municipalities in favor of individuals, 528.
between states and nations, 528.
cannot run against states in favor of individuals, 528, 529.
right to hold by lapse of time is entirely statutory, 516.
separate successive disseisins, whether constituting a continuous, 530.
squatters, rights of, 516.
tacking adverse interests, 529, 530.
transfer by disseisor, 524, 525.
after adverse possession of twenty years, 524, 525.
must be a transfer by deed, 525.
parol transfer will not pass title, 524, 525.
Aerolites, belong to owner of land, 310.
Aids, an incident of tenure by knight service, 34.
Air. See also Light.
right to, 310, 347, 350-352.
free from smoke, smell and noise, 350-352.
priorities in right to, 350, 351.
sic uti suo quod alienum non laedat,
defined and maxim applied, 350.
Alaska, purchase of, 25.

Alienation,
of real property,
by tenant in tail, 73.
in feudal times, 72.
growth of the right to, 72, 73.
restraints on, 105-113. See also Restraints on Alienation.
Aliens,
conveyance by,
subject to state regulation, 427, 428.
under the feudal system, 427.
dower of widows of, 274.
may hold land in America by statute, 46, 428.
in Illinois may hold land for a limited period of time, 46.
yellow races forbidden to hold land in California, 46.
Alluvion. See also Accretion.
defined, 535.
synonymous with accretion, 535.
Ancient Demesne, tenure by, 33.
Animals,
owner of cattle in the West not required to fence, 343, 344.
exception as to dangerous or diseased animals, 343.
Annuities, as incorporeal property, 3.
Appendant,
defined, 306.
appurtenant distinguished from, 306, 307.
nature of things, to land, 308.
powers, 496, 497.
defined, 496.
Appropriation,
of water in a stream, doctrine of prior, 359, 360.
beneficial use, what amounts to, 359.
for irrigation and milling purposes, 358.
Appurtenant,
defined, 307.
easement must belong to the estate in order to pass under the grant, 308.
incidents that pass with a grant of minerals, 310-314.
legal right necessary in order to pass, 308.
nature of things, to land, 308.
rights, to land, 306-314, 386, 387.
transfer of, 309.
something which adds value, 308.
use of the word in a grant of land, 307, 308.
Assignment,
of possibility of entry in a grant of an estate, 122, 123.
after breach of condition, 122, 123.
before breach of condition, 122.
Attorney, duty of, in preparing abstracts of title, 430.

Attornment, 395, 396.
defined, 395.
necessity of, done away with by the Statute of Anne, 396.
originally performed in presence of all the tenants, 395.

Bankruptcy,
effect of adjudication in, on real estate of bankrupt, 505.
filing of petition in, effect of, on bankrupt's property, 505, 506.
one may not create estate in himself until, then over to another, 105.
transfer of property by, 505, 506.
Bargain and Sale,
deed of, under Statute of Uses, 406.
seisin transferred by, under Statute of Uses, 133.
Base Fee, 62-65. See also Determinable Fee.
defined, 62.
becomes a fee simple, when, 63, 64.
conveyance by tenant in tail gives grantee a, at common law, 79.
incidents of, 63.
Bibliography, law of real property, 542.
Boundaries, 332-342.
ambiguities in, 332.
distinction between latent and patent, 332.
in deeds, agreement to remedy, not within Statute of Frauds, 333.
latent, defined and example of, 332, 333.
patent, defined and example of, 332, 333.
buyer should go on land and ascertain, by survey, 332.
certainty in, importance of, 332.
courses and distances, to ascertain, 336.
evidence to locate, 334.
fences as, 334.
fixed by acts of parties, 333, 334.
highway as boundary, 337, 338. See also street as boundary, under this heading.
"along a highway," 337.
legal presumption in respect to, 337.
question one of intention, 337.
"to a highway," 337.
"upon a highway," 337.
lake as boundary, 341, 342.
low water mark, 341, 342.
natural lakes, 341, 342.
monument,
artificial, 336, 337.
building as, 337.
governs when, 336.
natural, 335-337.
defined, 335.
lakes, mountains, ponds, rivers, rocks, trees, etc., as, 335, 341.

Boundaries, monument—*Continued*
parties are bound by, they set up, 333.
whether center of, is boundary, 336, 337, 341.
parol evidence to locate, admissible, when, 334.
pond as boundary, 341, 342.
low water mark, 341, 342.
river as boundary, 341.
commonly passes title to land under river to center of stream, 341.
"to the river and thence along the river," 341.
statutory methods of determining, 335.
street as boundary. See also highway as boundary, under this heading.
"along the side of the street," construed, 338.
on street not yet constructed, 340.
when street is vacated, 340, 341.
where distances reach only to edge of street, 338, 339.
legal presumption in respect to, 339.
where street is on edge of lot and wholly on land of one owner, 339, 340.

Cemeteries,
owners of lots in,
churchyard cemetery have an easement in their lots, 380.
incorporated cemetery hold lots in fee simple, 379.
Cestui Que Use, had beneficial interest without legal title, 126, 127, 130.
Charities,
cy pres doctrine defined and applied, 211.
dedication of land for charitable uses, valid, 478.
restraints on alienation of gift to, valid, 108.
rule against perpetuities applied to, 201, 208-212.
gifts,
to a charity to begin at a future time beyond the period of the rule, 208.
to a corporation to be formed, 211.
limitation,
after charitable gift, 209, 210.
from one charity to another, 210, 211.
to charities, 209.
sometimes said that rule does not apply to charities, 201, 208.
what charitable gifts subject to rule, 208, 209.
Class,
defined, 154, 213.
devise to a, 154, 155, 213-222.
children as a class, 216, 217, 219-221.
does not extend to after-born children, 220.
class must be treated as a whole, 213, 214.
examples of, 213-217.
grandchildren as a class, 214-217, 222.
in existence at time of testator's death, 216.

Class, devise to a—*Continued*
rule against perpetuities applied to, 213-222.
where members of class must necessarily be within the rule, 222.
rules for determining,
whether a class is closed, 219-222.
whether a, is invalid, 217-219.
situation at the death of the testator will govern, 214-217.
time of distribution as the test of membership of the class, 222.

Cloud on Title, examination of abstract for, 432.

Colonial Charters of American Colonies,
rights granted by, 22.
title to land under, 22, 23.
by free and common socage, 22, 23.
no oath of fealty required, 23.
regulated by common law of England, 22.

Common Recoveries, 75-78.
defined, 75, 78, 406.
destruction of estates tail by, 75-78.
proceedings under, 76-78.
provision that the devise of an estate tail cannot suffer, void, 109.
Taltarum's Case, created by, 75-78, 406.

Commons,
appendant, 386, 387.
defined, 386.
cannot be alienated or severed from the land they are appurtenant to, 386.
do not exist today, 382.
appurtenant for beasts not commonable, 387.
in gross, 387, 388.
defined, 388.
in the soil, defined, 388.
of estovers, defined, 388.
of pasture, 387, 388.
in England, 387.
none in America, 387.
of piscary, defined, 388.
of turbary, defined, 388.
pur cause de vicinage, 387.
rights to, by prescription, 347.

Community Property,
defined, 256.
a peculiar property right in southwestern states of the United States, 256.
wife, rights of, under, 256, 257.

Conditional Fee,
estates tail a form of, 67.
estate upon a condition distinguished from, 64.

Conditions,
bill in equity to enforce, when, 121.
breach of, in grant of an estate,
conveyance of right of entry upon, 123.
effect of, 124.
equitable relief against, 125.
equity will not protect against consequence of a willful act, 125.
where failure to perform is a result of an accident, 125.
license for, 123, 124.
rule of Dumpor's Case, 123, 124.
classes of, 115.
enforcing, 124, 125.
illegal or impossible, 117-119.
at common law, 118.
in an estate upon a condition, 114-125.
in deeds, 120-122.
where, of no value to grantor, 121, 122.
in restraint of marriage, 119.
void as against public policy, 119.
malum in se, 117.
malum prohibitum, 118.
precedent, 115, 116.
illegal or against public policy, effect of, 115, 116.
impossible of performance, effect of, 115.
rule of perpetuities does not apply to, in America, 206, 207.
subsequent, 116, 117.
applying to the grantee or lessee cannot be taken advantage of by his heirs, executors, administrators or assigns, 116.
construed strictly, 116, 117.
illegal or impossible conditions, 117.
in creating an estate, must not violate any rule of property, 119, 120.
time for performing, 117.
use of land may be restricted in grant, 120.
Consideration, in deeds, 127-130, 406, 407.
Constitutional Law, statute abolishing estates tail does not impair vested rights, 81, 82.
Contingent Remainders, 149-153, 158-168.
defined, 150.
alienation of, 165-167.
allowed where contingency upon which the remainder is to vest is not as to the person, 166.
at common law deeds which purported to convey, took effect by estoppel, 166, 167.
a very uncertain and slippery interest, 164.
become vested remainders, when, 152, 153.
changed to executory devises, when, 153.
classes of, 158, 159.
conditional limitations distinguished from, 161, 162.

Contingent Remainders—*Continued*
cross, 159, 160.
defined, 159.
depend upon language creating remainders, 151.
examples of, 150, 151.
executory devises,
changed to contingent remainders, when, 153.
contingent remainders,
never construed as, 159.
preferred to, 160, 161.
first known case of, in 1620, 161.
origin of, 161.
follow life estates, 161.
how a will may be drawn so as to give the devisee the right to sell and yet have the remainder go to a third person, 167, 168.
may be defeated by destruction of the particular estate on which they rested, 163.
merger of, 164, 165.
examples of, 164, 165.
merger to squeeze out, 165.
must not lap over preceding estates, 162.
not recognized in England until middle of fifteenth century, 158, 160.
origin of, 158, 159.
possibility upon a possibility, 159.
preservation of, 162.
presumption of construction in favor of, 160.
regarded as illegal at common law, 150.
rule of perpetuities does not apply to, when, 201.
statutes affecting, 167.
trusts to preserve, 163.
uncertainty as to estates vesting in interest characterizes, 151.
what will support, 163, 164.
where the contingency depends on whether an event which is sure to take place happens before the particular estate which supports it, 158, 159.
where the particular estate is subject to be determined by the happening of some contingent event, 158.
where the remainder depends on a contingency whether a certain collateral event shall happen, 158.
which depend on the uncertainty of the person who is to take, 159.
Conveyances,
of real property,
forms of, 403-412.
by deed, 403. See also Deeds.
by livery of seisin, 39-44, 403. See also Livery of Seisin.
by parol and entry, 403. See also Entry.
by record, 403. See also Records.
by special custom, 403. See also Custom.

Coparcenary, 251-253.
defined, 251.
coparceners,
conveyance by, to each other, 252.
mutual rights of, 252.
joint tenancy distinguished from, 251.
liable to curtesy and dower, 251.
nature of, 251.
owner in, with himself, 251, 252.
tenancy in common distinguished from, 252, 253.
Copyhold,
estates,
as estates at will, 50.
conveyances of, by special custom, 404, 405.
tenure, 33, 35.
defined, 33.
system of, never in use in the United States, 35.
Corporations,
as freeholders of land, 46, 47.
charter limitations, 47.
under,
early common law, 46.
modern statutes, 47.
Statutes of Mortmain, 46, 47.
restrictions on alienation in grants to, under early common law, valid, 108.
stocks of, as personal property, 9, 10.
two, cannot be joint tenants, 247.
Corporeal Property,
defined, 3.
articles which may be transported from place to place as, 1.
cattle as, 1.
hereditaments as, 4.
land as, 1.
livery of seisin of, 4.
messuage as, 4.
transfer of, 4.
Corruption of the Blood,
defined, 16.
not possible under United States Constitution, 16, 508.
under the feudal system, 16.
Co-Tenancy. See also Joint Tenancy; Tenancy in Common.
divisions of land not creating, 235, 236.
equitable estates may be subject to, 235.
in general, 232-236.
homestead exemption of property held in, 299, 300.
mining and water rights may be subject to, 235.
what property may be held in, 235.

Covenants,
against incumbrances, 437, 438, 441-444.
"and that the premises are free and clear of all incumbrances whatsoever," 441.
breach of,
action for, 443, 444.
actual damages allowed, 443, 444, 457.
broken, when, 441, 443, 444.
effect of, 443, 444.
Statute of Limitations begins to run, when, 442, 444.
do not run with the land, 453.
incumbrance,
defined, 442.
easement as, 443.
lien as, 442.
tax lien as, 443.
when a contract in future is an, 442.
enforcement of, 458.
American view, 458.
at law, 458.
English view, 458.
in equity, 458.
estoppel, application of, to, 461, 462.
examination of abstracts for, 432.
for further assurance, 437, 438, 445, 446.
advantage of, 446.
assurance, defined, 445.
breach of, 445, 446.
action for, when, 446.
run with the land, 453.
for quiet enjoyment, 437, 438, 445.
defined, 445.
breach of, 445.
broken, how, 445.
eviction constitutes, at common law, 450.
rule of damages for, 445, 457.
run with the land, 453.
of seisin, 439-441.
defined, 439.
breach of,
action for, 440, 441.
broken, how, 439, 440.
Statute of Limitations begins to run, when, 440.
do not run with the land, 453.
English rule, 439.
Massachusetts rule, 439.
referring to wild lands, construed how, 440.
of the right to convey, 437, 438, 441.

Covenants, of the right to convey—*Continued*
defined, 441.
broken, how, 441.
do not run with the land, 453.
of title, 437-462.
defined, 437, 438.
history of, 437.
introduced towards the close of the seventeenth century, 437.
liability of prior grantors, 453, 454.
American view, 453, 454.
effect of release of one grantor, 454.
right of intermediate grantors to sue covenantors, 454, 455.
cannot maintain an action until they are evicted, 455.
title defined and explained, 438.
who may take advantage of, 453.
of warranty, 437, 438, 446-457.
after Statute of Quia Emptores, 448, 449..
breach of,
adverse possession as, 457, 458.
continuing breach, 452.
occurs, when, 451-453.
American rule, 452, 453.
English rule, 451, 452.
substantial breach, 452.
what constitutes, 450, 451.
fictitious claims, 449.
covenantor bound to defend, when, 449.
general warranties, 449.
grantor may be compelled to join in defending title, 446-448.
history of, 448-450.
run with the land, 453.
special warranties, 449.
"that the grantor warrants and defends the granted premises against all claims of all persons whatsoever," 446.
under the feudal law, 448.
running with the land, 397-402.
defined, 397, 453.
agreement to fence, when it runs, 344, 345.
assignment of,
by statute passed in time of Henry VIII, 397, 398.
not assignable at common law, 397.
benefit, 399.
burden, 399, 456.
courts will not enforce, when, 400, 401.
modern tendency, 401.
covenants,
against incumbrances, of seisin and right to convey do not run, 453.
creating an easement run, 399.

Covenants, running with the land, covenants—*Continued*
for further assurance, quiet enjoyment and warranty run, 453.
in aid of profits run, 399.
purely personal do not run, 453.
run, when, 399, 400, 456.
creation of,
privity of estate necessary for the, 400, 456, 457.
English doctrine, 456, 457.
equitable easements, 401, 402. See also Equitable Easement.
heirs bound, when, 398, 399.
must so relate to the land as to affect its value and enjoyment, 397.
only covenants under seal run, 397, 398.
relating to things not in existence, 398.
Creditor, system of uses defrauded the, 127.
Crops,
annual, planted by tenant, as personal property, 7, 316, 317.
"away-going crops," defined, 319.
covered by mortgage, 319, 320.
foreclosure of mortgage, effect of, 320.
Massachusetts rule, 319, 320.
New York rule, 320.
cultivated by husband on wife's land, belong to wife, 318.
not subject to levy and sale under an execution against husband, 318.
cultivated by tenant, rights of landlord and of tenant, 319.
fructus industriales, 315-317. See also Fructus Industriales.
fructus naturales, 315-317. See also Fructus Naturales.
growing,
on death of testator go to devisee and to executor, when, 318.
on sale of realty go to grantee unless specially reserved, 318.
planted by owner of soil, as real property, 7, 315, 316.
ownership of, 315-322.
sown by trespassers, 319.
belong to,
owner of land before gathering, 319.
trespasser when gathered, 319.
Crown, since 1085 title to land derived from the, 33.
Curtesy, 53, 54, 258-268.
defined, 53, 258.
a life estate, 255, 261, 264.
cannot be,
barred by will of the person giving lands to wife, 267.
defeated by attainder of wife, when, 262.
commenced at the birth of issue capable of inheriting, 258, 259.
consummate, 259, 260.
conveyance in fraud of, 255.
created for the benefit of the family, 255.
divorce bars, 264.
effect of disseisin on, 264-266.

Curtesy—*Continued*
ends upon husband's death, 260.
estate by, 53, 54, 258-268.
liable for husband's debts, 264.
may be leased or assigned, 264.
of England, 258.
examination of abstract of title for interest of, 432.
history of, 258, 259.
illegitimate child, whether, creates, 261.
incidents of an estate by, 264.
initiate, 259, 260.
in the trust estate of wife, 54.
in the United States, 259.
exists at common law unless abolished by statute, 259.
in wild lands, 256.
issue capable of inheriting must be born alive, necessary to an estate by, 260, 261.
born after death of mother, 261.
joint tenancy not subject to, 246.
legal marriage necessary to create, 260.
may be barred by an intention so expressed when lands are conveyed in trust, 267, 268.
nature of, 261-263.
no curtesy in a remainder or reversion, 263.
requisites of an estate by, 260, 261.
seisin fundamental to, 263, 264.
at common law, seisin by deed necessary, 263.
under statutes, 263.
system of uses defrauded husband of his, 127.
tenancy in common subject to, 240.
tenant by initiate, 262.
to what estates attached, 266, 267.
absolute estates, 266.
estates upon a conditional limitation, 266.
qualified and determinable estates, 266.
Custom,
conveyances by special, 404, 405.
confined to copyhold estates, 404, 405.
easement by, 371, 372, 388.
in America there is no, 372.
in England, 371, 372.
in favor of husbandry or drying of nets on land of another, 372.
of gavelkind, 371.
reasonable when, 371, 372.
"time of memory," 372.
ascertained in England to commence from the beginning of the reign of Richard I, 372.
to be valid must be certain, 371.

Cy Pres Doctrine,
defined, 211.
applied, 211.

Damages,
for breach of covenants, 445, 457.
for injury to subjacent support of land, 364, 365.
Dedication, 475-479.
defined, 475.
acceptance by the public, 475, 478, 479.
a devotion of land to public use, 475.
by gift, 475, 476.
character and scope of, 476.
conditional or limited, 477, 478.
at common law, void, 478.
doctrine of, principles upon which it rests, 476.
for highways, 477.
form of, 475, 476.
for park and public purposes, 477.
for what time, 476, 477.
how completed, 477.
life tenant, whether a, can make a, 477.
made by owner in fee, or one having an interest in land, 475.
nature of, 475, 476.
never held to be within Statute of Frauds, 475.
terminable, objection to, 476, 477.
theory of, 476.
to charitable or religious uses, valid, 478.
Deeds. See also Conveyances; Feoffment.
abstracts of title, 430-436. See also Abstracts of Title.
aliens, conveyance by,
subject to state regulation, 427, 428.
under the feudal system, 427.
alterations in, 411, 412.
interlineations, 412.
made by third party will not render deed void, 412.
practice among conveyancers where alterations have to be made in deeds before execution, 412.
presumed to be made before execution, in England, 411.
ancient form of, 404. See also Feoffment.
at common law strictly construed, 68.
by lease and release, 132, 406.
classes of, 405.
consideration in, 127-130, 406, 407.
conveyance,
to a class, 154, 155.
to grantor alone inoperative, 428.
to grantor and others as tenants in common, valid, 428.

Deeds, conveyance—*Continued*
to several and their representatives construed, 234.
deed poll,
defined, 345, 405.
binding on grantee, when, 345.
delivery of, 418-424. See also Delivery, of deed.
disseisee,
doctrine holding deed of, void, 426, 427.
may convey, when, 427.
exception in deed of strip subject to easement, effect of, 428, 429.
fee is excepted in the strip, 428, 429.
execution of, 426.
defined, 426.
indentures defined, 405.
infant,
cannot convey land, 426.
power to convey for, in guardian, 426.
lunatic,
cannot convey land, 426.
power to convey for, in conservator, 426.
materials used in, 410, 411.
ink not indispensable, 411.
paper or parchment, Blackstone's reasons for the use of, 410, 411.
use of lead pencil, 411.
of bargain and sale, 406.
created by Statute of Uses, 406.
seisin transferred by, under Statute of Uses, 133.
possession of deed after recording, bearing of, on delivery, 424.
registration of,
under recording laws, 463-469. See also Records.
under Torrens System, 470-474. See also Torrens System.
restrictions in,
that land may not be used for maintaining a boiler house, livery stable, slaughter house or soap factory, 120.
where condition is of no value to grantor, 121, 122.
sealing of, 407-410, 426. See also Seals.
short statutory forms of, 411.
signature to, 407.
not required before Statute of Frauds, 407.
use of mark as, 407.
to incorporeal hereditaments, 428.
who may convey land, 426-428.
words necessary in, to create an estate tail, 68, 69.
Delivery,
of deed, 418-424.
ceremony of the ancient doctrine in the, 425.
conditional, 420, 421.
defined, 421.

Delivery, of deed, conditional—*Continued*
attaching creditors, rights of, in case of, 421.
delivery in escrow distinguished from, 420.
in escrow, 419, 420.
defined, 419.
conditional delivery distinguished from, 420.
to a stranger to the deed, 419.
to grantee's agent not good delivery, 419.
to whom, may be made, 419, 420.
intervening grantees, rights of, in case of, 420, 421.
necessity of, 418.
oral statement of, 418, 419.
American rule, 419.
English rule, 418.
"I deliver this as my act and deed," construed, 418.
recording of deed as, 423, 424.
to agent, 422.
of grantee, 422.
of grantor, 422.
to be effectual the power of dominion must be parted with, 423.
to third party,
for benefit of grantor, 421, 422.
when grantor retains control, 422, 423.
Descent, under gavelkind, 33, 34. See also Gavelkind.
Determinable Fee, 62-65. See also Base Fee.
defined, 62.
merged with the reversion in one person becomes a fee simple absolute, 63, 64.
Discovery, title to real property by, and possession, 21, 22.
Disseisin,
defined, 40.
deed of a disseisee, effect of, under modern law, 40.
disseisee, defined, 40.
disseisor, defined, 40.
effect of, on curtesy, 264-266.
right of action barred after twenty years, 265.
right of entry accrues for recovery of, 265.
Distress,
for rent,
defined, 396.
main incident of the common law, 396.
Divorce,
effect of, on homestead exemptions, 295, 296.
divorce by husband, 295.
divorce by wife, 295.
Domesday Book,
defined, 32, 33.
the basis of feudal tenures, 32, 33.

Double Possibilities, Rule Against, 198.
Dower,
defined, 269.
ad ostium ecclesiae, 269, 270.
adultery of wife bars, 282.
adverse possession, effect of, on, 271, 285.
a life estate, 255, 269, 272.
assignment of,
"against common right," 285, 286.
by agreement, 285, 286.
methods of, 285, 286.
"of common right," 285, 286.
proceedings to enforce, 286, 287.
brought where the land lies, 286.
suit personal in nature, 287.
attaches to freehold estates, 276.
barred, when, 281-285.
how to bar, 281, 282.
at common law by fine, 281.
in America by jointure, 281, 282.
in England, 281.
consummate right of, what is, 272.
created for the benefit of the family, 255.
dedication of land to the public by husband bars, 282.
divorce bars, when, 283.
examination of abstracts of title for interests of, 432.
gift by will in lieu of dower bars, 284, 285.
grant of land to railroad for public use bars, 282.
husband, right of, to convey land to prevent, 255.
inchoate right of, what is, 271, 272.
indeterminable estates, 279, 280.
in estates upon conditional limitation, 280.
in equity of redemption, 275.
in mines which are open and worked, 276.
in mortgaged property, 274-276.
on foreclosure, 275.
on transfer of equity in mortgagee, 275, 276.
when purchase and mortgage,
are one transaction, 274.
are two transactions, 274.
in wild lands, 256, 276, 288.
joint tenancy not subject to, 246, 247.
jointure as a bar to, 281, 283, 284.
by Statute of Uses, 283.
in America, 281.
requisites, 283, 284.
kinds of, 269, 270.
land taken by eminent domain bars, 282.

Dower—*Continued*
law will not grant, out of a dower estate, 280, 281.
legislative control of, before vesting, 273, 274.
nature and quality of the estate subject to, 276, 277.
nature of, 271-294.
before vesting, 273.
not a right against the husband's estate but only against the land itself, 272.
not granted,
in equitable estates, 279.
in executory devise, 280.
object of, at the present time, 270.
of aliens, 274.
on exchange of lands, 278, 279.
rule of common law adopted in most states, 278, 279.
origin of, 270.
repealed by statute in England recently, 284.
requisites of, 270, 271.
death of husband, 270, 271.
legal marriage, 270, 271.
seisin of the husband, 270, 271, 277, 278.
right to, protected by Magna Charta, 270.
seisin of husband requisite to, 277, 278.
wrongful seisin, effect of, 278.
system of uses defrauded wife of her, 127.
tenancy in common subject to, 240.
time of estimating, 287-289.
at time dower is assigned, 287, 289.
different rules in various jurisdictions, 287.
increase in value of share, 288.
in England, 288.
in lands sold by husband and subsequently improved, 288, 289.
test, 287.
where claim is made by heir, 287, 288.
to what does the, attach, 276.
under statutes, 269.
widow not a tenant in common with heirs of property until dower is assigned, 238.

Due Process of Law, Torrens Acts upheld as being proceedings in rem and not as violating, 470, 471.

Dying Without Issue. See also Failure of Issue.
construction of, in a will, 71, 205, 206.
American rule, 205, 206.
by Connecticut court, 71.
English rule, 205.
"dying without issue him surviving" construed to mean an indefinite failure of issue, 181.

Easement, 369-382.
defined, 369, 383.
abandonment of, 380.
"a charge or burden on one estate for the benefit of another," 369.
acquisition of, based on theory of lost grant, 519.
an incumbrance to title, 442.
"a privilege without profit," 369.
by custom, 371, 372, 388.
in America there is no, 372.
in England, 371, 372.
reasonable when, 371, 372.
"time of memory" ascertained in England to commence from the beginning of the reign of Richard I, 372.
by prescription, 372, 373, 517-519.
accrued at common law before the passing of the Statute of Limitations, 518.
acquisition of, defenses against, 519.
action to prevent the running of the Statute of Limitations, 373.
disabilities to adverse use, 534.
in the United States, 518, 519.
based on a definite use for a prescriptive period hostile to the landowner, 372.
presumptions, 519.
test of, 518.
theory in regard to, 518.
creation of, 145.
at common law, might be created to begin in the future, 144.
by deed only, 384.
by the words of a covenant, 399.
extinguishment of,
by parol license, 383.
by unity of possession of dominant and servient estates, 347, 381.
fencing as an, 369.
in gross, 370, 371.
in lateral support of land, 362, 363. See also Support of Land.
kinds of, 369, 370.
licenses in the use of real property distinguished from, 383.
merger, 381, 382.
of an estate for years and servient estate suspends, 381.
of dominant and servient estates extinguishes, 381.
Mill Acts, 379. See also Mill Acts.
natural right distinguished from, 347.
negative, 369, 370.
not regarded as one of the usual estates in land, 145.
of light, 348, 349. See also Light.
of right of way,
defined, 373.
abandonment of, 380, 381.

Easement, of right of way, abandonment of—*Continued*
by adverse use, 380.
intention, what is evidence of, 380, 381.
voluntary, 380.
by deed, 373.
by grant, 347, 373.
by necessity, 375, 376.
arises, when, 375.
cannot exist,
over land of a stranger, 375.
where there is other means of access to the land, 375.
servient tenant has right to designate a course, 376.
by prescription, 373, 374.
creation of, 145, 373.
extinguishment of, by unity of possession of dominant and servient estates, 347, 381.
gate, bridges or buildings on way, 376, 377.
grade of, may be raised or lowered, 376.
presumption that it is not an easement in gross, 371.
repairs or grade of, who is required to make, 376.
requisites of, 373.
"to this and all places beyond," 374.
to what place, 374, 375.
of the right to let eaves drip on land of another, 379.
pews as easements, 379.
positive, 369.
occurs, when, 369.
right of way as a, 370.
profit distinguished from, 370.
public, is in the nature of an easement in gross, 476.
rights in cemeteries in the nature of easements, 379, 380.
right to,
drain, 377.
pond water on land of another, 378.
an incorporeal hereditament, 379.
take an, by eminent domain, 504.
servient tenant,
defined, 343.
obligation of, to fence, 343.
spurious, defined, 343.
Statutes of Limitations applied to, in the United States by analogy, 518.
which limits natural rights, 369.

Eaves, adverse possession of land under projecting, 379, 524.

Education, governmental grants of public lands for purposes of, 485, 486.

Emblements. See also Crops.
regarded as personal property, 317.

Eminent Domain, 503, 504.
defined, 503.
a form of involuntary transfer of property, 503.
compensation to owner an absolute requirement, 503.
constitutional requirements in respect to, 503.
must be exercised in accordance with statutory authority, 503.
property taken by, can be used only for a public use, 503.
right to take easement by, 504.
Entry,
upon breach of condition by grantor of an estate, 122, 123.
effect of, 124.
enforcing breach of condition by, 124, 125.
equitable relief against breach, 125.
possibility of, assignment of, 122, 123.
after breach, 122, 123.
before breach, 122.
right of,
conveyance of, after condition broken, 123.
may be waived, 125.
Equitable Conversion,
defined, 136.
applies, where, 137.
conversion,
a question of intention, 136.
mere power of sale will not work a, 137.
must be obligatory, 136.
takes place at what instant, 137, 138.
in option to purchase in a lease, 139.
nature and origin of the doctrine, 136, 137.
of partnership property for debts of partnership, 138, 139.
reconversion allowed, when, 139, 140.
rule stated, 136.
Equitable Easement, 401, 402.
defined, 401.
depends on notice, 401.
English distinction of, not important in America, 401.
examples of, 401, 402.
homestead exemption of, 299.
of married women, 110. See also Married Woman.
restraints on alienation of, 105.
Escheat,
defined, 16.
system of uses defrauded the overlord of his, 127.
today is an incident of sovereignty, 37.
Estates,
defined, 6, 49.
arising by marriage, 254-257.
at will, 50.

Estates, at will—*Continued*
defined, 50.
copyhold estates as, 50.
by entirety, 234, 235, 254, 255.
at common law, 254, 255.
under statutes, 255.
by sufferance, 50.
defined, 50.
may be terminated at election of landlord, 50.
creation of, by reservations, 54.
equitable,
have same incidents as legal estates, 52-54.
exception to, 53.
incapable of livery of seisin, 53.
of curtesy, 53, 54.
of dower, 53.
fee tail. See Estates, tail, under this heading.
for years, 49, 50, 105.
defined, 50.
called chattel interests, 49.
cannot be restrained absolutely, 105.
may be created,
by any form of words, 50.
by devise as well as contract, 50.
for a period less than a year, 50.
freehold,
defined, 49.
cannot be created to begin in the future where there is not some immediate estate of freehold in the meantime, 51.
cannot be in abeyance, 51, 52.
distinguished from estates less than a freehold, 49, 50.
must be continuous, 52.
grant to,
A for life, and one year after his death to B and his heirs, invalid, 144.
A for life, but if he is married, then to B and his heirs, invalid, 144.
A for life, then to B for life, then to C in fee, valid, 145.
A until he marries, then to B and his heirs, valid, 144, 145.
oneself until bankruptcy, and then over to another, invalid, 105.
in fee simple, 55-61. See also Fee Simple.
less than a freehold,
defined, 50.
distinguished from freehold estates, 49, 50.
kinds of, 50.
life, 97-104. See also Life Estate.
of frank marriage, 52.
defined, 52.
reversion to grantor, when, 52.

Estates—*Continued*
rule of Shelley's Case, 83-96. See also Shelley's Case, Rule of.
tail, 66-82.
defined, 66, 74.
abolished,
by converting fee tail into fee simple, 81.
by statute in Canada and United States, 79, 81, 82.
a form of conditional fee, 67.
after possibility of issue extinct, 79.
alienation of, 72, 73.
by tenant in tail,
after issue is born, 73.
before issue is born, 73.
arose when the land was granted to a man and to the heirs of his body, 66.
barring of, 75-79.
by appointment by the tenant to charitable uses, 78.
by common recovery, 75-78. See also Common Recoveries.
by lease which did not prejudice the issue, 78.
exceptions to, 79.
cannot be restrained absolutely, 105.
chargeable for judgment for debts of tenant, 80.
conveyance by tenant in tail at common law gives grantee a base fee, 79.
created,
by deed, 68, 69.
in will, 68, 69.
by implication, 69.
devise to A and his children when A has no children, 71.
docking of, 75-78.
donee in tail, defined, 67.
early history and construction of, 67.
estate upon a conditional limitation distinguished from, 177.
general, 66.
gift over on failure of issue creates, when, 69-71.
examples of, 70, 71.
void for remoteness, creates a fee tail estate, 70.
granted by the Crown could not be barred, 79.
growth of the right of, 72, 73.
in the United States, 80-82.
brought into American Colonies with the common law of England, 80.
by statute modified or abolished, 80-82.
joint tenancy for life distinguished from, 71.
limitations,
before and after, 202, 203.
to take effect at the end of, which are destructible, good, 202.
nature of, 66, 67.

Estates, tail—*Continued*
provision that devisee of, cannot suffer common recovery, void, 109.
special, 66.
Statute De Donis, application of, 73-75. See also Statute De Donis Conditionalibus.
tail female, defined, 66.
tail male, defined, 66.
tenant in tail,
defined, 67.
barred by common recovery, 181.
cannot commit waste, 79.
judgments for debts of, estate tail chargeable, 80.
may make leases of land not to exceed twenty-one years from the day of making, 79.
rights and liabilities of, 79, 80.
terminology, 66, 67.
Wild's Case, rule of, 71, 72.
words necessary to create, in deeds and in wills, 68, 69.
trusts subject to the same incidents as belong to, 53.
upon condition, 114-125.
defined, 114, 169, 280.
breach of the condition,
conveyance of right of entry upon, 123.
effect of, 124.
enforcing, 124, 125.
equitable relief against, 125.
license for a, 123, 124.
rule in Dumpor's Case, 123, 124.
condition,
in restraint of marriage, void, 119.
malum in se, 117.
malum prohibitum, 118.
must be good or valid, 115.
must not be contrary to good morals or public policy, 115.
precedent, 115, 116. See also Estates, upon condition precedent, under this heading.
subsequent, 116, 117. See also Estates, upon condition subsequent, under this heading.
violation of, does not in itself terminate the estate, 122.
conditional fee distinguished from, 64.
entry,
conveyance of right of, after condition broken, 123.
necessity of, when there is a violation of condition, to terminate an estate upon condition, 122.
possibility of, assignment of, 122, 123.
before breach of condition, 122.
effect of, 122, 123.
estate upon a conditional limitation distinguished from, 64, 169-173.

Estates, upon condition—*Continued*
grantor does not part with his entire interest, 114.
may by subsequent conveyance grant interest he has reserved, 114.
may re-enter when, 169.
in general, 114.
nature of, 114, 115.
persons are always in being, 171.
require some act to be done in order to effect the transfer of the estate back to the grantor, 172.
restrictions in deeds, 120-122.
where of no value to grantor, 121, 122.
rule against perpetuities does not apply to, 174, 175.
terminate when, 171.
time for performing conditions, 117.
trust distinguished from, 175.
words of condition, 173, 174.
upon conditional limitation, 169-180.
came into use in 1620, 180, 181.
Pells v. Brown, statement of case, 180, 181.
contingent remainder distinguished from, 161, 162.
estate over in, is to be distinguished from a remainder, 175.
estate tail distinguished from, 177.
estate upon a condition distinguished from, 169-173.
happening of the event is in itself a limitation, 173.
limitation over of estate undisposed of, 177-180.
American rule, 178.
English rule, 177, 178.
Massachusetts comment on, 179.
origin of rule, 178, 179.
"provided" may be a word of limitation or condition, 174.
remainder distinguished from an estate over in, 175-177.
rule against perpetuities applies to, 174, 175.
terminate upon the happening of the event, 169, 173.
words expressing limitation are "during," "until," "while," 173.
upon condition precedent, 115, 116.
do not come into existence until condition is performed, 115.
illegal or against public policy, effect of, 115, 116.
impossible of performance, effect of, 115.
subsequent condition does not prevent the vesting of the estate, 116.
upon condition subsequent, 116, 117.
condition,
applying to the grantee or lessee cannot be taken advantage of by his heirs, executors, administrators or assigns, 116.
construed strictly, 116.
must not violate any rule of property, 119, 120.
Estoppel,
against municipal corporation in favor of a corporation who erected buildings on unused street, 529.

Estoppel—*Continued*
application of, to covenants, 461, 462.
doctrine of, by deed, 458-460.
between grantee and grantor, 459, 460.
classes of, 460.
in America covers all classes of conveyances, 459, 460.
in England restricted to leases, 459.
"feeding the estoppel," defined and explained, 461.
of grantor to set up superior title to the one he has previously affirmed, 458.
title by, 460.
by matter in pais, 460.
defined, 460.
by matter of deed, 460.
classes of, 460.
by matter of record, 460.
Eviction,
defined, 450.
constitutes breach of covenant for quiet enjoyment, 450.
constructive, 451.
for non-payment of rent, 395.
effect,
when landowner evicts, 395.
when third party evicts, 395.
Evidence,
certified copy of record of deed or mortgage as, 467.
record of deed or mortgage as, 467.
Execution,
of deed, 426.
defined, 426.
sealing and delivery of deed as, 426.
sales, 509-512.
appraisal prerequisite to, 510.
cannot be attacked collaterally, 512.
conduct of sale, 510.
deed by sheriff necessary to complete, 511, 512.
for payment of debts by statute, 509.
memorandum signed necessary by Statute of Frauds, 511.
proceedings, 509, 510.
purchaser at, acquires only debtor's title, 511.
vacating sale, 512.
where unfairly or collusively made, 512.
Executory Devise,
defined, 171, 180.
after a life estate coupled with power to alienate in fee, 167.
attitude of English courts as expressed in Seasongood v. Edge, 185.
bad, when, 217.
changed to contingent remainder, when, 153.

Executory Devise—*Continued*
contingent remainder,
changed to, when, 153.
never construed as, 159.
preferred to, 160, 161.
defeated when, 180.
effect of the creation of, 185, 186.
executory devisee not a party to a common recovery, 181.
first known case of, in 1620, 161.
origin of, 161, 180.
tends to perpetuities, 185.

Failure of Issue. See also Dying Without Issue.
definite, 177, 204, 205.
example of, 204, 205.
indefinite, 177, 204, 205.
"dying without issue him surviving" construed to mean, 181.
example of, 204, 205.
limitations upon, in grant of an estate, rule of perpetuities applied when, 204-206.

Fee,
defined, 6, 55, 74.
absolute, 180.
at common law one could not grant a, and annex conditions which are repugnant to the grant, 182.
base, 62-65. See also Base Fee.
conditional, 64. See also Conditional Fee.
determinable, 62-65. See also Determinable Fee.
in incorporeal hereditaments, 61.
interest in real property less than a, an estate, 6.
may be implied by a grant to trustees, 56.
necessity of word "heirs" to pass, 55-58, 84.
at common law, 55, 56.
in deeds, 57.
in wills, rule less strict, 57, 58.
modern rule, 56-58.
construed most strongly against grantor, 56.
upon a fee, common law courts decided that a grantor could not limit a, 175, 185.

Fee Simple,
estate in, 55-61.
defined, 55.
alienation of, 58, 59.
condition in restraint of, void when, 59, 107.
restrictions on, 58, 59.
right of, recognized as inherent, 58, 105.
curtesy, liability of the estate for the incident of, 58.
descends to heirs upon death of owner, 59.

Fee Simple, estate in—*Continued*
divided into successive estates, 148, 149.
dower, liability of the estate for the incident of, 58.
forfeited for treason at common law, 58.
incidents of, 58, 59.
legal conception of, 148.
liability of, for debts of deceased owner, 59-61.
by statutes in England of 1807 and 1833, 60.
creates a lien in favor of creditor, 61.
in United States, 60, 61.
under early common law, 59, 60.
necessity of word "heirs" to pass fee, 55-58. See also Fee.
in incorporeal hereditaments, 61.
Fences,
defined, 343.
as an easement, 369.
as boundaries, 334.
obligation to fence, 343-346.
along highway, 345.
at common law no obligation, 345.
as covenant running with land, 344, 345.
by agreement, 343, 344.
by custom, in England, 344.
by prescription, 343, 344.
by statutes, 346.
classed as an easement, 343.
creation of, 343, 344.
did not exist at common law, 343.
nature of, 343.
railroad is under no, unless by agreement or by statute, 345, 346.
parol agreement to remove fence, subsequent purchaser from covenantor not bound, 398.
proper kind of a fence, 346.
statutes in regard to, 346.
Feoffee to Use, 126.
Feoffment. See also Deeds.
defined, 43, 403, 404.
feoffee defined, 43.
feoffor defined, 43.
"give" was the proper technical term to use in a, 404.
seal used instead of signature, 404.
Statute of Uses, effect of, on, 404.
with livery of seisin is the most ancient form of conveyance known to the common law, 43, 404.
Feudal System, 13-17.
corruption of the blood, 16.
decline of the, 17.
escheat, 16. See also Escheat.

Feudal System—*Continued*
established by Goths and Vandals when they subdued Rome, 13.
feudal fruits and privileges, 15, 16.
system of uses defrauded lords of, 130.
fines, 15, 16. See also Fines.
in Europe, 13, 14.
influence of, on individual rights, 16, 17.
introduction of the, into England, 14, 15.
by Norman Conquest in 1066, 14.
land known as tenements under the, 17.
land the basis of government under the, 13.
reliefs, 15. See also Reliefs.
services required of lords and villeins under, 16.
subinfeudation, 47.
tenants in capite, 13, 14.
tenures, 16, 17.
by knight service, 17. See also Tenure.
Statute of 12 Charles II,
abolished feudal tenures, 17.
established tenure by free and common socage, 17
uses as an attack on the, 130.
villeins, 16.
wardship, 15. See also Wardship.
Fines,
defined, 15, 16.
and recoveries, 405, 406. See also Common Recoveries.
conveyances by, 405, 406.
incidents of tenure by knight service, 34.
Statute De Donis, effect of, on, 406.
under the feudal system, 16.
Fire,
whether tenant under lease is liable for rent of buildings destroyed by, 328, 329.
English rule, 329.
in America lease usually contains exemption, 328.
Fixture,
defined, 8.
by annexation to real estate becomes real property, 8, 11.
status of property whether a, may be controlled by special agreement, 8.
Florida, purchase of, from Spain, 25.
Forfeiture,
of real property for crime, 507, 508.
confiscation sale, 507, 508.
history of, 507.
"no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attainted," provision of the Federal Constitution, 508.

Forfeiture, of real property for crime—*Continued*
of rebels of the Confederacy, 507.
today, 508.
when title passes, 508.
Frankalmoign,
tenure by, 35, 36.
defined, 35.
an ecclesiastical tenure, 35.
character of, altered at the time of the Reformation, 36.
service under, 35, 36.
Frank Marriage,
estates of, 52.
defined, 52.
reversion to grantor, when, 52.
Free and Common Socage, 17, 22, 23, 33, 36.
land held,
in America under colonial charters by, 22, 23, 36.
in England today by, 36.
tenure by, 17, 33, 36.
Freeholders,
aliens as, 46.
California bars yellow races from holding land in 1913, 46.
in Illinois aliens may hold land for a limited period of time, 46.
corporations as, 46, 47.
charter limitations, 47.
under early common law, 46.
under modern statutes, 47.
under Statutes of Mortmain, 46, 47.
rights and privileges of, beyond the mere enjoyment of land, 49.
who may be, 46, 47.
Freehold Estates,
defined, 49.
cannot be in abeyance, 51, 52.
estates less than a freehold distinguished from, 49, 50.
grant of, to take effect in future cannot be made, 51, 148.
must be continuous, 52.
rule of Shelley's Case does not apply to, when, 89, 90, 92, 93.
Fructus Industriales,
defined, 315.
fructus naturales distinguished from, 315, 316.
may be levied on, 317.
regarded as personal property, 7, 316, 317.
sale of, by parol, 317.
severed from soil, when considered as, 317.
Fructus Naturales,
defined, 315.
fructus industriales distinguished from, 315, 316.
regarded as real property, 7, 315, 316.

Fructus Naturales—*Continued*
rule as to, 316, 317.
sale or mortgage of, within the Statute of Frauds, 316.
when severed considered as personal property, 317.
Future Estates. See also Contingent Remainders; Estates; Remainders; Reversions; Vested Remainders.
alteration of interests,
after testator's death, 153, 154.
before testator's death, 153.
examples of, 153, 154.
at common law, 144, 145.
estates could not begin at future time, 145.
grant to,
A for life, and one year after his death to B and his heirs, invalid, 144.
A for life, but if he is married, then to B and his heirs, invalid, 144.
A for life, then to B for life, then to C in fee, valid, 145.
at once to fifty different people separately for their lives, valid, 148.
A until he marries, then to B and his heirs, valid, 144, 145.
contingency on which, vest, stated in the alternative, 197, 198.
example of, 197, 198.
could not be granted in fee, 147.
fee simple divided into successive estates, 148, 149.
if too remote, void, 197.
questions of practical importance in considering, 184.
rule of perpetuities applies to all, 201. See also Perpetuities, Rule Against.
seisin of subsequent estate must take effect, when, 147, 148.

Gas, natural, as property, 312.
Gavelkind, 33, 34, 371.
defined, 34.
descent under, 34, 371.
prevailed in County of Kent, England, 34.
tenure of, 34, 371.
Gift,
by will in lieu of dower bars dower, 284, 285.
of income, rule of Shelley's Case does not apply, 94, 95.
of land to a person and his heirs with livery of seisin was all that was necessary to convey a fee simple before Statute of Uses, 127.
Grand Sergeanty,
defined, 34.
tenure by, 34.

Hawaiian Islands, annexation of, 25.

Heirlooms,
defined, 8, 9.
descend to heir as real property, 8, 9.
transferable by a person during life, 9.
"Heirs,"
construed as "heirs of the body," when, 156.
rule of Shelley's Case construes, 83-96.
"Heirs of His Body,"
"heirs" construed as, when, 156.
rule of Shelley's Case construes, 83-96.
Hereditaments,
as corporeal property, 4.
as immovables, 2.
fee simple in incorporeal, 61.
Highways. See also Street.
acquired by prescription, 476.
as boundary to land, 337, 338.
"along the highway," 337.
legal presumption in respect to, 337.
question one of intention, 337.
"to a highway," 337.
"upon a highway," 337.
dedication of, 475-479. See also Dedication.
title to, never appurtenant to abutting owner, 340.
Homestead Exemption, 290-305.
attaches to residence, 302, 303.
bars liabilities of all kinds, 303.
beneficiaries under, 291.
children usually not entitled to, 295.
claims excepted from, 303, 304.
creditor may follow proceeds of sale of homestead, when, 303.
divorce, effect of, on, 295, 296.
equitable interests will support, 299.
equity of redemption sufficient basis for, 299.
estate necessary to support homestead, 297, 298.
estate for life or in fee, 297.
remainders or reversions will not support, 297.
head of the family,
boarding house keeper not a, 293.
exemption to the, 292.
illegitimate child will make parent the, 293.
legal adoption will create, in adopting parent, 293.
legal obligation to support necessary to constitute, 293.
natural or moral duty to support held insufficient to constitute when, 292.
obligation to support requisite of a, 292, 293.
one person cannot be a, 292.
person living alone with servants not, 293.

Homestead Exemption, head of the family—*Continued*
temporary loss of, does not affect homestead, 294.
unmarried man or unmarried woman may be, when, 294.
wife as, 294, 295.
homestead,
defined, 301.
change of, 305.
is subject to rights of strangers having paramount title, 297.
occupancy of, necessary for, 301.
origin of, 290.
title unnecessary to support, when, 298.
leasehold interest by statute will support, 298.
legislature has general power,
to create, 290, 291.
to repeal, 291.
loss of, by waiver, fraud, removal from premises, sale or otherwise, 304, 305.
necessary that persons live together in one house, 292.
object of, is to protect families, 291.
occupancy necessary for, 301.
occupant of land under a contract to purchase may claim, 298.
of,
detached parcels of land, 303.
land held by partnership or in co-tenancy, 299, 300.
land used in part as residence, 301, 302.
persons living together in adultery not entitled to, 292.
purchaser of land entitled to, when, 298.
remainder or reversion will not support, 297.
right to,
frequently confined to citizens, 296.
sometimes allowed to all residents, 296, 297.
sometimes called a mere privilege, 290.
status necessary to claim, must exist, when, 294.
statutes,
give no new title, 290.
repeal of, effect and validity of, 291.
sometimes give an estate in lands, 290.
validity of, 290, 291.
termination of,
by fleeing from state for purposes of escaping criminal prosecution, when, 297.
by removal from state, 296.
temporary removal not enough for, 296.
widow entitled to, when, 292, 294.
widower entitled to, when, 292, 294.
wife entitled to, when, 294, 295.
Husband and wife,
at common law were one person, 254.

Husband and Wife—*Continued*
by marriage,
at common law wife's property became merged with husband's property, 254.
by statute wife retains right to property, 254.
conveyances in fraud of marital rights, 255, 256.
crops cultivated on land of wife by husband belong to wife, 318.
estates of entirety, 234, 235, 254, 255.

Immovables, 1, 2.
lands, tenements and hereditaments as, 2.
tenures, system of, applied only to, 2.
Incorporeal Property,
defined, 3.
annuity as, 3.
corporeal property distinguished from, 1.
debts as, 1.
rents, annual, as, 3.
rights in action as, 1.
transfer of, 4.
Indians,
communal lands of Six Nations in New York, 26.
possession and right to use land by, 27.
regarded by international law as mere temporary occupants of the soil, 28.
relations of the United States government with the Indian tribes, 29, 30.
rights of, 25-27.
title of, to land, 27-31.
ceded by treaty, 29, 30.
Chief Justice Marshall's decision on, 27.
sustained, 30, 31.
if based on occupation and possession, 30.
United States has exclusive right to acquire title from Indians, 27.
Infant,
"born in due time afterwards," construed, 199.
cannot convey land, 426.
conceived, held legally born, 190.
power to convey for, in guardian, 426.
usually not entitled to homestead exemptions, 295.
Instruments, recording of, 463-469. See also Records.
Intoxicating Liquors, sale of, restriction in deed against use of land for, 120.
Investiture,
defined, 42.
vesting of land by, 42.
Islands,
arising in non-navigable rivers,

Islands, arising in non-navigable rivers—*Continued*
in center of river, belong to owners on shores in common, 539.
nearer one shore than the other, belong to owner of shore nearest which they arise, 539.
arising in the sea, belong to occupier, 539.
caused by river changing its course, ownership does not change, 539, 540.
formed in private waters, ownership of, in the owners of the bed of the water, 540.

Joint Estates, rule of Shelley's Case does not apply to, 94.

Joint Tenancy, .
defined, 232, 245.
conveyance of joint estates, 248, 249.
coparcenary distinguished from, 251.
creation of, 244, 245.
devise to A and his children and A has children living creates a, for life, 71.
effect of modern statutes on estate by, 250.
estate to two or more trustees as, 247.
example of, 247.
favored at common law, 246.
for life or in tail, 245.
incidents of, 246, 247.
in fee simple, 245.
joint mortgages, 247, 248.
joint tenants,
alienation of, share of, 245.
interest of one joint tenant cannot be conveyed to another, 248.
interests of, must be created at same time, 246.
rights between, 245.
lapse, effect of, 248.
nature of, 245, 246.
partition of estate in, 249.
"per my et per tout," 245.
presumption in favor of,
denied in America, 233.
in England, in early law, 232, 233.
severance of an estate in, 249, 250.
survivorship upon death of a joint tenant, 232, 245, 249, 250.
abolished by statute, 250.
tenancy in common distinguished from, 232.
unity of time, 246.

Jointure,
defined, 283.
as a bar to dower, 281, 283, 284.
created by marriage settlement, 283.

Knight Service, tenure by, 17, 34.

Lakes, as boundaries, 341, 342.
Land. See also Real Property.
defined, 5, 6.
houses, bridges, buildings of every description legally considered as, 5.
meaning of the term, may be controlled by context, 5.
nature of ownership in, 1-305.
Landlord and Tenant. See also Lease.
landlord may enjoin erection of brewery on leased land, 327.
rent, 394-396. See also Rent.
tenant,
at will is bound to make fair and reasonable repairs, 325.
crops cultivated by, rights of landlord, 319.
implied duty of, to repair, 324, 325.
removal of structures erected by, when waste, 328.
test, 328.
trees planted by, when personal property, 8.
Lease. See also Landlord and Tenant.
acceptance of new lease operates as a surrender of an old, 414, 415.
condition in, that if rent is not paid landlord may re-enter, 116.
homestead exemption under, 298.
of real property as personal property, 7.
option to purchase in,
effect of death of owner on, 139.
equitable conversion when, 139.
oral surrender of, without change of possession is forbidden by Statute of Frauds, 415.
provisions in, exempting payment of rent, 328, 329.
restriction on the power to lease, void, 106.
system of uses defrauded the poor tenant of his, 127.
tenant in tail may execute a, not to exceed twenty-one years, 79.
"without impeachment of waste," defined, 323.
Lease and Release, conveyance of property by, 132, 406.
License,
in the use of real property, 383-385.
defined, 384.
by lower riparian owner to upper riparian owner to take more than his share of water, 383.
distinction between licenses creating and extinguishing easements, 384, 385.
easement distinguished from, 383.
executed, 385.
forms of, 383, 384.
implied license to purchaser of chattel to get it, 384.
irrevocable, when, 385.
revocation of, 384, 385.
to cut a ditch from land to draw off water, 383.

Liens,
as incumbrance of title, 442.
examination of abstracts of title for, 431, 432, 434, 435.
Life Estate, 97-104.
defined, 97, 98.
at common law conferred by same feudal rights and solemnities as fees themselves, 98.
called the particular estate, 141.
cannot be restrained absolutely, 105.
creation of, 97, 98.
estate
as long as a person
shall live in a certain town as, 97.
shall pay a certain sum as, 97.
of women during widowhood as, 97.
pur autre vie as, 97, 99, 100.
defined, 99.
cestui que vie, defined, 99.
fraud in, 100.
general occupant, defined, 99.
owner of, might dispose of it under statute passed in reign of Charles II, 99, 100.
special occupant, defined, 99.
statutes affecting, 99, 100.
to man and woman during coverture, 97.
homestead exemption may be claimed in, 297.
is a freehold, 97.
livery of seisin of, 98.
may cease,
on the bankruptcy of life tenant, 109.
on the happening of a certain event, 109.
merger of, with greater or lesser estate, effect of, 100, 101.
nature of, 97, 98.
origin of, 97.
provisions that life estate shall not be subject to claims of creditors, void, 109.
reservation by grantor creates in him a, 98.
reversion distinguished from, 141.
tenant for life,
defined, 97.
conveyance by, of greater estate than he has, effect of, 98, 99.
duty of,
not to commit waste, 102, 103.
to defend title, 104.
to pay taxes and interest on incumbrances, 103, 104.
improvements by, compensation for, under statutes, 103.
lease by, to under-tenant, apportionment of rent, 102.

Life Estate, tenant for life—*Continued*
right of, 98, 99, 102, 103.
to assign or create sub-tenancies, 98, 99.
to cut timber, for what purposes, 102, 103.
to plow ground, 103.
seisin by, 98, 146.
termination of, by,
civil death, 100, 101.
natural death, 101.

Light,
right to, 347-350.
by express agreement, 349.
by implied agreement, 348, 349.
English rule, 348.
by prescription, 347, 348.
English rule of acquisition of an easement, 348, 350.
not permitted in America, 349, 350.

Livery of Seisin,
defined, 42.
by one joint tenant is livery for all, 246.
by symbols, 42.
ceremony of, 41-43.
under feudal system, 41, 42.
under the common law, 42, 43.
giving of staff, a ring, a sword or the putting upon tenant of a robe as, 43.
in case of,
life estates, 98, 146.
remainders, 39, 40.
vested remainders, 39, 40.
in the United States, 44.
investiture, 42.
kinds of, 43, 44.
livery in deed, defined and illustrated, 43, 44, 146.
livery in law, defined and illustrated, 43, 44.
of corporeal property, 4, 146.
on devise of land, 39.
remainderman cannot make, 40.
with feoffment is the most ancient form of conveyance known, 43.

Livery Stable, restriction in deed that land may not be used for, 120.

Louisiana Purchase, 25.

Lunatic,
cannot convey land, 426.
deed of,
formerly held void, 426.
modern tendency to hold, voidable, 426.
power to convey for, in conservator, 426.

Machinery,
as personal property, 11.
attached to building becomes real property, 11.
Malum In Se, condition of grant creating an estate which is, grant void, 117.
Malum Prohibitum,
condition of grant creating an estate which is, grant void, 118.
smuggling as an example of, 118.
Manor, 18-20.
defined, 18.
courts, 18.
history of the, 18-20.
land of, held by military tenure, 20.
name of Norman origin, 18.
tenure under the, 20.
Manure, considered as real property, 9, 10.
Markets, right to, by prescription, 347.
Marriage Settlements,
jointure created by, 283.
rejecting modifying clause by a clause against anticipation, 230.
rule of Shelley's Case does not apply to, 94.
Married Woman,
estates of, restraints on alienation valid, 110.
gift in trust for, restraints on alienation, trust valid, 110.
separate property right of, recognized by English Court of Chancery in the eighteenth century, 110.
Maxims,
cujus est solum, ejus est usque ad coelum, 5.
sic uti suo quod alienum non laedat, 350.
Merger,
of contingent remainders, effect of, 164, 165.
of dominant and servient estates extinguishes easement, 381.
of estate for years and servient estate suspends easement, 381.
of life estate with greater or lesser estate, effect of, 101, 102.
to squeeze out contingent remainders, effect of, 165.
Messuage,
defined, 4.
as corporeal property, 4.
Meteoric Stones, belong to the owner of the land, 310.
Mill Acts,
created easements to dam water back on land, 379.
unconstitutional in some states, 379.
Mines,
abandonment of, 330, 331.
cessation of work not necessarily, 330.
discontinuance of work in, distinguished from, 330.

Mines—*Continued*
interest,
in the land, 10.
in the ore, 10.
minerals,
are
personal property when detached from ground, 311.
real property while in the ground, 311.
deed to land includes, 310.
incidents that pass with a grant of, 310-312.
reservation of, in the transfer of land, 5.
opening and working of, when waste, 329-331.
mine not worked for years when considered as an open mine, 329.
support of land by landowner, 10.
Monuments, used in boundaries, 335-337. See also Boundaries, monument.
Mortgagee,
lien of, to secure loan, 468.
owner of the conditional estate at common law, 468.
regarded as a purchaser under the recording law, 468, 469.
rights of, against subsequent purchaser, 468, 469.
title does not pass to, under modern law, 468.
Mortgages,
dower in mortgaged property, 274-276.
examination of abstracts of title for, 434, 435.
given to secure debts due to two or more persons severally, 248.
homestead exemption in equity of redemption, 299.
joint, 247, 248.
foreclosure, effect of, 247.
of crops, 319, 320.
foreclosure sale, effect of, 320.
recording of, 463-469. See also Records.
regarded as an estate in land, 247.
Mortmain, Statutes of. See Statutes of Mortmain.
Movables, goods or chattels as, 1, 2.
Municipal Corporations,
adverse possession of land by individual against, 528, 529.
estoppel against, in favor of one who erected buildings on an unused street, 529.

Natural Gas. See Gas.
Nuisance,
annoyance distinguished from, 351.
difference between coming to a nuisance and a nuisance coming to you, 352.
equity will not enjoin, unless damage can be proved, 352.
factory not a, where, 351.

Nuisance—*Continued*
no defense that defendant committed the nuisance complained of before plaintiff bought his land, 350.
pounding of candy, when a, 352.
ringing of church bells inordinately, enjoined as a, 350.
smelting factory not considered as a, when, 351.

Oil,
petroleum,
detached from ground is personal property, 311.
in place,
a mineral, 311.
real property, 311.
Operation of Law,
surrender by, 413-415.
applied where, 413, 414.
Option,
to purchase in a lease,
effect of death of owner on, 139.
equitable conversion, when, 139.

Partition,
defined, 513.
accounting on, 514, 515.
a method constituting an involuntary transfer of land, 513.
by sale of land, 513, 515.
coparceners entitled to, 513.
joint tenants and tenants in common,
not entitled to, at common law, 513.
statute passed in time of Henry VIII entitled, to, 514.
nature of, 513.
owelty of, 514, 515.
who is entitled to, 513, 514.
Partnership,
land of,
held in tenancy in common, 239, 240.
subject to homestead exemption, when, 299, 300.
Party Walls, 391-393.
agreement in regard to use of, 391.
alteration in, 392, 393.
party making, liable for damages, 392.
where raised by one of the parties he cannot take them down again, 393.
land under, is held in common in England, 391.
ownership of, 391.
treated as structures for common benefit, 392.
use of, right of parties to, 391, 392.
Percolating Water. See Waters.

Perpetuities, Rule Against,
defined, 183, 184.
accumulations, 198-200. See also Accumulation.
alienability whether the test, 193-195.
New York rule, 193, 194.
when not the test, example of, 194, 195.
an example of judicial legislation, 184.
application of, 201, 212.
applied to,
charities when, 201, 208-212. See also Charities.
classes, 213-222. See also Class.
conditional limitations, 174, 175.
estates tail, when, 202, 203.
limitations after an equitable estate tail, 203.
limitations over upon failure of issue, 204-206.
definite failure of issue, 204, 205.
indefinite failure of issue, 204.
powers, 223-228. See also Powers.
to all future interests except charities and conditions in America, 201.
to all future interests except charities in England, 201.
to modifying clauses and separable limitations, 229-231.
a rule of convenience, 196.
a severe rule which applies without regard to circumstances of the particular case, 192.
common law rule governing, 183.
description of the beneficiary under the, 196.
does not apply to,
conditions in America, 174, 175, 201, 206, 207.
reason for, 207.
contingent remainders, when, 201.
estate over upon definite failure of issue, 204.
estates tail, when, 202.
vested interests, 201.
"double possibilities," rule against, 198.
effect of possibility of issue extinct, 192, 193.
gift construed as valid if possible, 196, 197.
growth of the, 184, 185.
step by step, 184.
limitation within life in being, 186.
mere possibility that the limitation may be remote invalidates the grant, 195.
more exact to call the, a rule against remoteness, 184.
New York rule, 193.
number of lives in being, 186, 187.
common law rule modified by statute, 187.
should be ascertainable, 187.
used as a test, 187, 188.

Perpetuities, Rule Against—*Continued*
origin of, 184.
period,
in gross added to rule in 1697, 188, 189.
of gestation added to rule, 189, 190.
several periods of gestation, 190.
whenever it is of interest of any person that it should be, 190.
of minority added to rule in 1736, 189.
possibility upon a possibility, doctrine of, the invalidity of, 198.
reason for the rule, 193, 208, 210.
remoteness,
effect of, 197, 198.
New York rule, 193, 194.
whether the test, 193, 194.
"to be placed in trust for as long a period as is legally possible," not bad for remoteness, 187.
"to those of my grandchildren who reach twenty-one," a good limitation, 189.
where subject of gift must fail within the period, 195, 196.
Personal Property,
defined, 3.
leases as, 7.
origin of the term, 2, 3.
real property distinguished from, 7-12.
same property may be either real property or, when, 11.
Shelley's Case, rule of, does not apply to, 95.
Statute of Uses does not apply to, 132.
stock, shares of, as, 7, 10, 11.
trees planted by tenant, when, 8.
Petroleum Oil. See Oil.
Pews,
owners of,
have a right in the nature of an easement, in America, 379.
hold in fee simple in England, 379.
Philippine Islands, acquisition of, 25.
Ponds,
abutter on natural, acquires title to land which has been left by reliction, 540.
as boundaries, 341, 342.
low water mark rule, 341, 342.
nature of right in artificial, 540.
Porto Rico, acquisition of, 25.
Possibility upon a Possibility, doctrine of the invalidity of, 198.
Posthumous Children, 190-192.
children conceived,
considered as already born for all purposes for their own benefit, 191.
doctrine of, one of judicial legislation, 191.
held legally born, 190.

Posthumous Children, children conceived—*Continued*
taking of,
by,
descent, 190, 191.
purchase, 190, 191.
Powers,
defined, 223, 487.
abatement of power, 495.
appendant,
defined, 496.
extinguishment of, 496.
appointment,
fraudulent, 493-495.
example of, 494, 495.
illusory, defined, 493.
power to appoint not a technical trust, 493.
to further selfish interest of the donee of the power, invalid, 494, 495.
collateral,
defined, 487.
cannot be released, 498.
coupled with an interest,
defined, 487, 488.
example of, 487, 488.
donee of power,
defined, 223, 487.
right of, to appoint, 224.
to leave by will whether treated as owner, 225, 226.
example of, 223.
exclusive,
defined, 488.
"to such one or more of them exclusive of the others," 488.
execution of,
by gift in a will, 489-491.
English rule, 489, 490.
adopted by many courts in America, 490.
Massachusetts rule, 490, 491.
defective, 492, 493.
excessive, 491, 492.
for a definite class, 492.
must be in accordance with power, 489.
where intended, classes of cases, 490.
who may exercise, 489.
example of, 489.
extinguishment of,
power to appoint by will, 500, 501.
special power in gross, 497-500.
general power,

Powers, general power—*Continued*
defined, 223, 487.
donee of, treated as owner, 224.
equal to a limitation in fee, 224.
release of, 495.
in gross,
defined, 487, 497.
example of, 497, 498.
release of, 497.
lapse of power, 495.
may be appendant or appurtenant, 487.
non-exclusive power, 492.
of sale, 226, 227.
particular. See also Powers, special, under this heading.
defined, 487.
donee does not act as owner of fee, 226.
release of, 497.
power to appoint by will,
donee can release testamentary power according to English view, 500.
extinguishment of, 500, 501.
Professor Gray's views on, 501.
release of power, 495.
appendant, 496, 497.
by conveyance before appointment, 496.
by a valid conveyance of property over which power exists, 493.
formal, 495.
in general, 495, 496.
in gross, 497.
special power in gross, 497-500.
rule against perpetuities as applied to, 223-228.
appointee of power not born at time of appointment, 224.
date of reckoning validity of appointment under special power, 226.
donee of power to leave by will when appointment is within, 225, 226.
Professor Kales' view of, 226.
exercise of power of sale, when within, 227.
where description might be remote but actual facts show the contrary, 227, 228.
special,
defined, 487.
in gross, extinguishment of, 497-500.
American tendency, 499, 500.
English doctrine, 497, 498.
Professor Gray's views on, 500.
test of, 499.
tortious conveyances, 498, 499.
Statute of Uses, effect of, on, 488, 489.
terminology, 487, 488.

Praecipe,
defined, 50, 51.
tenant to the, 50, 51.
Pre-emption,
defined, 31.
land may be acquired by, 31.
Premises, defined, 6.
Prescription,
easement by, 372, 373, 517-519.
accrued at common law before the passing of the Statutes of Limitations, 518.
acquisition of, defenses against, 519.
action to prevent the running of the Statute of Limitations, 373.
disabilities to adverse use, 534.
in the United States, 518, 519.
based on a definite use for a prescriptive period hostile to the landowner, 373.
presumptions, 519.
test of, 518.
theory in regard to, 518.
obligation to fence by, 343, 344.
profits à prendre by, 388, 389.
based on immemorial use, 388.
to take fish, 388, 389.
right of way by, easement of, 347, 373, 374. See also Easement, of right of way.
right to,
commons by, 347.
light by, 347, 348, 350.
markets by, 347.
water in a stream by, 347, 359.
ways by, 347, 373, 374.
Profits, 386-390.
defined, 386.
à prendre, 386-390.
by grant, 389.
by prescription, 388, 389.
based on immemorial use, 388.
to take fish, 388, 389.
cannot be created by custom, 388, 389.
commons,
appendant, 386, 387.
defined, 386.
cannot be alienated or severed from the land they are appurtenant to, 386.
do not exist today, 387.
appurtenant,
for beasts not commonable, 387.

Profits, commons—*Continued*
in gross, 387, 388.
defined, 388.
in the soil, defined, 388.
of estovers, defined, 388.
of pasture, 387, 388.
in England chief profits, 387.
none in America, 387.
of piscary, defined, 388.
of turbary, defined, 388.
pur cause de vicinage, 387.
easements distinguished from, 370, 386.
effect of transfers of land on, 389, 390.
extinguished by unity of possession of dominant and servient estates, 390.
in gross,
may be assigned, 389.
may not be divided, 389.
rights appurtenant, 386, 387.
coalshed on lot gives, to store coal, 387.
icehouse on lot, whether it gives, to cut ice, 387.
Property,
classes of, 1-3.
personal. See Personal Property.
real. See Real Property.
title and, distinguished, 6.
Public Lands, 24, 480-486.
acres of hard land, what are, 482.
adoption of system of, in United States, 24.
deed of,
by government, land described how, 483.
by private party, land described how, 483.
fractional sections, 482-484.
governmental grants of, for educational purposes, 485, 486.
land department of federal government,
established in 1812, 482.
officers of, for sale of, 485.
rules of, in regard to sale of, 482.
patent,
defined, 485.
issuing of, 485.
rights of riparian owners, 484.
sale of, 485.
stream meandered, what is meant by, 482.
survey of the, 480-482.
correction of error due to the approach to each other of meridians, 483, 484.
how to be made, 480, 481.

Public Lands, survey of the—*Continued*
into
parts of quarter sections, 481.
quarter sections, 481.
sections, 481.
townships, 480, 481.
provided for by federal statutes, 480.
Pur Autre Vie,
estate,
defined, 99.
cestui que vie, defined, 99.
fraud in cases of, 100.
statute passed in reign of Queen Anne required occupant to produce cestui que vie upon proper proceedings, 100.
general occupant, defined, 99.
owner of, under statute passed in reign of Charles II,
dying without will, effect of, 100.
may dispose, 99, 100.
special occupant, defined, 99.
statutes affecting, 99, 100.

Quia Emptores, Statute of. See Statute of Quia Emptores.

Railroads, obligation to fence their tracks, by agreement or by statute, 345, 346.

Real Property,
defined, 3, 5, 6.
at common law exempt from debts of owner, 290.
crops, when, 7, 8, 315, 316. See also Crops.
fixtures as, 8. See also Fixture.
growth of individual rights in, 45, 46.
heirlooms descend to heir similar to, 8, 9. See also Heirlooms.
houses, bridges and buildings of every description legally considered as, 5.
manure as, 9, 10.
meaning of, may be controlled by context, 5.
mines as, 10. See also Mines.
nature of ownership in, 1-305.
origin and terminology of rights in, 1-6.
ownership of, above and below surface, 309, 310.
personal property distinguished from, 7-12.
products of the soil, ownership of, 315-322.
property in, title distinguished from, 6.
rights appurtenant to, 306-314.
appendant and appurtenant distinguished, 306, 307.
minerals, 310-312.
nature of things which are, 308.

Real Property, rights appurtenant to—*Continued*
transfer of, 309.
trees, 312-314.
same property may be either personal property or, 11.
titles of honor as, 7.
titles to, see also Title, to real property.
distinguished from property in, 6.
sources of, in America, 21-31.
under statute charged with debts of owner, 290.
use and enjoyment incident to ownership of, 306-346.
use and enjoyment of land of another, 347-402.
Reconversion,
defined, 140.
doctrine of, 139, 140.
Records. See also Torrens System, of land registration.
certified copy of, may be introduced as evidence, 467.
deed or mortgage regarded as recorded when, 464.
entry book for deeds and mortgages before actual recording, 462.
a mere memorandum of name of the parties and the instrument left for record, 464.
error in grantor's middle name, 467.
not constructive notice to a subsequent bona fide purchaser from mortgagor, 467.
instrument not entitled to be recorded, when, 464, 465.
may be introduced into court as evidence, 467.
mistake in record, effect of, 465, 466.
recording officer not liable, 466.
subsequent purchaser has the right to rely on the record, 465.
mortgagee regarded as purchaser under the recording laws, 468, 469.
recording laws, 463-469.
are purely statutory, 463.
object of, 463.
substantially uniform in various states, 430, 463.
recording of deed,
as delivery, 423, 424.
record as evidence of the deed, 423, 425, 467.
register,
not liable for mistakes in, 466.
obligation of, to record only what is on face of the instrument, 464.
subsequent purchaser,
must be a bona fide purchaser for value to be protected, 468.
rights of, under recording laws, 467, 468.
unrecorded deed is defeated by recording deed of, 468.
seal on instrument necessary for recording, when, 464, 465.
separate books for deeds, mortgages and other instruments, 463.
title, proof of, from, 467.
Torrens System of land registration, 470-474. See also Torrens System.

Records—*Continued*
where kept, 463.
at county seat, 463.
Registration of Land. See Records; Torrens System, of land registration.
Reliction. See also Accretion.
distinguished from accretion, 535, 536.
Reliefs,
defined, 15.
an incident of tenure by knight service, 34.
system of uses defrauded the overlord of his, 127.
under the feudal system, 15.
Religious Societies, dedication of land to religious uses, valid, 478.
Remainders,
defined, 39, 142, 143.
adverse possession of land begins to run against, when, 526.
after estates tail, 155.
at common law, 144.
contingent, 149-151, 158-168. See also Contingent Remainders.
conveyance of, 146, 147.
created at the same time as particular estate, 144, 149.
essential to, that they take effect upon determination of the particular estate, 149, 155.
estate over in a conditional limitation distinguished from, 175 177.
example of, 176, 177.
"heirs" construed as "heirs of the body," when, 156.
in a class, 155.
kinds of, 149.
livery of seisin in case of, 39, 40.
no homestead exemption in, 297.
one may create a remainder in himself, 144.
particular estate and remainder must constitute continuous ownership, 149.
remainderman,
can never make livery of seisin, 40.
may be uncertain during particular estate, 154.
uncertainty, whether, will enjoy estate does not prevent remainder from being vested, 156, 157.
"remainder to heirs," construction of, 152.
reversions distinguished from, 143, 144.
too remote are void, 197.
vested, 39, 40, 149-151. See also Vested Remainders.
vesting of remainder,
Archer's Case, 155, 156.
on determination of particular estate, 155, 156.
rule and example of, 157.
when it is determined who will take it, 157.
Rent, 3, 102, 394-396.
defined, 394.

Rent—*Continued*
actions for non-payment of, 395.
annual, as incorporeal property, 3.
apportionment of, where life tenant has made a lease of property to sub-tenant, 102.
attornment, 395, 396. See also Attornment.
charge,
defined, 395.
created by Statute of Anne, 395.
distress for,
defined, 396.
main incident of rent at common law, 396.
eviction for non-payment of, 395. See also Eviction.
ground,
defined, 394.
not common in America except in Pennsylvania, 394.
kinds of, 394, 395.
reserved, defined, 394.
seck,
defined, 395.
cannot be distrained, 395.
created by Statute of Quia Emptores, 395.
service,
defined, 394.
parties may distrain for, 395.
treated as a question of property, 394.
Reservations,
defined, 54.
creation of new estates by, 54.
Restraints on Alienation. See also Alienation.
of real property, 105-113.
conditional restraint of a fee in general is bad, 107.
distinction in the validity of restraint on alienation between estates of inheritance and those not of inheritance, 106.
invalid provision against alienation does not defeat the estate, 106.
limitation,
on alienation in a particular way is bad, 106.
to particular persons, when bad, 107.
may be either direct or indirect, 105.
no legal estate in fee, in tail, for life, or for years can be restrained absolutely, 105.
of
a fee, absolutely void, 106, 107.
contingent remainders not vested, valid, 110.
equitable estates, 105.
estate for years, valid, 110.
estates of married women, valid, 110.
gifts to charities of a fee not prohibited, 108.

Restraints on Alienation, of real property, of—*Continued*
grants to corporations under early common law, valid, 109.
legislative grants, valid, 108, 109.
spendthrift trusts, 105, 110-113.
provision annexed to a fee, legal or equitable, that owner shall not alienate is bad, 106.
restrictions in,
alienation for a certain time, generally bad, 107, 108.
the power to lease, void, 106.
Reversions,
defined, 39, 63, 65, 141, 142.
adverse possession of land begins to run against, when, 526.
at common law, 144.
conveyance of, 146, 147.
determinable fee merged with the, in one person becomes a fee simple absolute, 63, 64.
example of, 63, 64, 141.
life estate distinguished from, 141.
no homestead exemption in, 297.
possibility distinguished from, 65.
remainders distinguished from, 143, 144.
Statute De Donis secured a reversion to grantor of an estate tail, 142.
Rights,
natural,
defined, 347.
easement distinguished from, 347.
to air, 347, 350-352. See also Air.
to light, 347-350. See also Light.
to water, 352-360. See also Waters.
Riparian Owners. See Waters.
Rivers,
as boundaries, 341.
"to the river and thence along the river," use of, 341.
Rule Against Perpetuities. See Perpetuities, Rule Against.
Rule of Shelley's Case. See Shelley's Case, Rule of.

Seals,
to deeds, 407-410.
form of, 408, 409.
history of, 407, 408.
import consideration, 409, 410.
not in general use among the Saxons, 407.
origin of, 407.
present value of seal, 407, 410.
printed impressions as, 409.
scrolls as, sufficient, 409.
sealing wax, drops of, as, 409.
stamped paper, 409.

Seals, to deeds—*Continued*
wafers as, 408.
wax as, 408.
Seisin. See also Livery of Seisin.
defined, 38.
according to the theory of the common law, 39, 502, 503.
a fundamental principle,
of modern land law, 40, 41.
of the common law, 41.
Anglo-Saxon theory of, 502.
attributes of, 38, 39.
could not be in abeyance or suspense, 39, 147.
covenant of, 439-441. See also Covenants, of seisin.
disseisin, 40.
defined, 40.
deed of a disseisee, effect of, 40.
fundamental to curtesy, 263, 264.
implies a freehold estate for life or in fee, 38.
in case of remainders, 39, 40.
in fact, 38.
in law, 38.
livery of, 39-44. See also Livery of Seisin.
of subsequent estate must take effect, when, 147, 148.
on devise of land, effect of, 39.
signifies possession with a legal right to the estate in land, 38.
transferred by bargain and sale under the Statute of Uses, 133.
vital today, 41.
Servient Tenant, defined, 343.
Shelley's Case, Rule of, 83-96.
defined, 83-85.
applies to equitable interests, 95.
a rule of property and not of construction, 88.
cases,
to which applied with illustrations, 88.
where not applied with illustrations, 88-96.
determines when a tenant having a freehold grant shall be free to alienate it, 87.
does not apply
to
cases where,
a freehold is given to one with remainder to heirs of two persons who may have a common heir, 92, 93.
no estate of inheritance is given the heirs, 89, 90.
no freehold is given the ancestor, 89, 90.
the effect of the word "heirs" is changed by explanatory words, 90.
the new estate of inheritance is grafted on the heirs, 91.
executory trusts, 94.

Shelley's Case, Rule of, does not apply, to—*Continued*
gifts of income, 94, 95.
joint estates, 94.
marriage settlements, 94.
personal property, 95.
effect of, 87, 88.
in the United States, 96.
named from a celebrated case in Lord Coke's time, 83.
origin and reason for the, 85-87.
as suggested by Lord Mansfield, 86.
lost in obscurity, 85, 86.
statement of, 83-85.
the "heirs" and "heirs of his body" construed by, 83-96.
"words of limitation" as expressed in, explained, 84, 85.
Shifting or Springing Use,
defined, 182.
created by deed, 182.
Shrubbery, planted with intention of removal, whether realty, 321.
Sic Uti Quod Alienum Non Laedat, defined, 350.
Signature, to deeds, 407.
Slaughter House, restriction in deed that land may not be used for, 120.
Smuggling, as an example of malum prohibitum, 118.
Special Assessments, examination of abstracts of title for, 435.
Spendthrift Trusts,
American rule, 111, 112.
jurisdictions opposed to the, 112, 113.
English rule, 110, 111.
limitation to trustees giving them a discretion as to the use of the property, whether valid, 111.
Massachusetts rule, 112.
restraints on alienation of, 105, 110-113.
trusts for grantor, 113.
Statute De Donis Conditionalibus, 73-75.
defined, 73.
also known as Statute De Donis and Statute of Westminster the Second, 73.
effect of, on the barons and on the Crown, 74.
intention of the, to put an end to tenant in tail disposing of his holdings, 74, 406.
not applicable to personalty, 75.
protected only the entail of inheritances, 75.
secured to a grantor of an estate tail a reversion, 142.
Statute of Enrollment,
applied only to estates of inheritance of freeholds, 133.
did not apply to estates for years, 133.
required bargain and sale of an estate to be by deed indented and enrolled, 133.

Statute of Frauds,
contract for sale of standing trees within the, 322.
dedication of land not within the, 475.
effect of, on surrenders, 413.
sale of mortgages of fructus naturales within the, 316.
signature to deeds not required before, 407.
Statute of Limitations,
bars remedy against person holding adversely, 516.
by analogy applied to easements in United States, 518.
cannot run against infants, 533, 534.
earliest, passed in England in 1275, 516.
Statute of Quia Emptores,
defined, 47, 48.
abolished subinfeudation, 48.
estates of fee simple, effect on, of the, 58.
invested freemen with the power to sell their lands, 48.
Statute of Uses,
application of, to a use on a use, 134.
cases to which the, does not apply, 131, 132.
effect of,
on devises, 135.
on powers, 488, 489.
to transfer business of court of chancery to law courts, 131, 132.
in the United States, 135.
operation of, 130-132.
passed in reign of Henry VIII, 131.
provisions of, 131.
seisin transferred by bargain and sale under, 133.
trusts survive the, when, 134, 135.
Statute of Wills, right to devise land by will created by, 48.
Statutes of Mortmain,
corporations restricted in the holding of land under, 46, 47.
use originated to evade the, 126, 128.
Stock, share of, as, 7, 9, 10.
Street. See also Boundaries; Highways.
as boundary,
"along the side of the street" construed, 338.
on street not yet constructed, 340.
when distances reach only to edge of street, 338, 339.
legal presumption in respect to, 339.
when street is vacated, 340, 341.
where street is on edge of lot and wholly on land of one owner, 339, 340.
Subinfeudation,
defined, 47.
required tenants of barons to hold enough land to secure feudal service, 47.
Statute of Quia Emptores abolished, 48.

Support of Land, 361-368.
defined, 363.
adjacent,
abutters on highway, 362, 363.
prescriptive right to, 362.
right of, 361.
an absolute right, 365.
injury to lateral support,
caused by intervening owner, 363, 364.
in its natural condition, 361.
liability for
removing solids in solution, 367, 368.
quicksand, petroleum, salt in solution, 367.
when damage does not immediately follow excavation, 364.
when land itself is not damaged, 361, 362.
injury to subjacent support,
effect of existence of buildings, 365.
question of damage to buildings proper to consider, 365.
liability does not depend on negligence, 365, 366.
lateral,
easement in,
cannot be acquired between private landowners, 362.
may be acquired by abutters on highway, 362, 363.
no natural right to, for buildings, 362.
neighboring landowner, defined, 363.
right to, 361.
subordinate to rights in percolating waters, 366.
subjacent, 364, 365.
nature of right, 364.
rule of damages, 364, 365.
Surface Waters. See Waters.
Surrender and Release, 413-417.
release,
by extinguishment, 417.
by way of enlargement, 416.
kinds of, 416.
per mitter le droit, 416, 417.
per mitter l'estate, 417.
surrender,
defined, 413.
acceptance of new lease is a, of an old lease, 414.
by operation of law, 413-415.
applied where, 413, 414.
cannot take effect in the future, 416.
effect of Statute of Frauds on, 413.
in deed, 413.
kinds of, 413.
must operate at once, 416.

Surrender and Release, surrender—*Continued*
operation and effect of, 415, 416.
oral, with change of possession, 415.

Tail,
defined, 74.
estates, 66-82. See also Estates, tail.
Taxes, claims for, not subject to homestead exemption, 304.
Tax Sale, 504, 505.
a form of involuntary transfer of property, 504.
essentials necessary to, 504, 505.
public advertising essential before, 505.
redemption of property after, by landowner by payment of taxes and cost of sale, 505.
Tax Titles, examination of abstracts of title for, 435.
Tenancy by Entirety,
defined, 234.
of husband and wife a legal fiction, 234, 235.
Tenancy in Common, 232, 234, 237-243.
defined, 232, 237.
common estate in America today is, 233.
coparcenary distinguished from, 252, 253.
creation of,
by descent, 238.
by grant, 237, 238.
by two grants of same property, 239.
in accord with ancient custom, 232.
incidents of, 240.
interests in, subject to rights of curtesy and dower, 240.
joint tenancy distinguished from, 232, 237.
partnership land held in, 239, 240.
presumption in favor of, in America, 233, 234.
survivorship upon death of a joint tenant, 232.
tenants in common,
actions against, 243.
actions between, 243.
cannot maintain trespass against one another, 240.
have entire possession, 241.
liability of one tenant for rent, 242.
at common law, 242.
under statute, 242.
mutual rights of, 240, 241.
right of,
one tenant to purchase at foreclosure sale, 242.
to alienate their share or portion, 241.
to use and possession, 241, 242.
widow not a tenant in common with heirs of property until dower is assigned, 238.

Tenants in Capite,
defined, 13.
land held by, previous to Norman Conquest, 18.
Tenement,
defined, 4.
land was known as, under feudal system, 17.
Tenure,
defined, 2, 32.
allodial,
defined, 15, 32.
land is held in America today by, 37.
Saxons held their land by, 15, 32.
ancient demesne, 33.
by free and common socage, 17, 22, 23, 33, 36. See also Free and Common Socage.
by knight service, 17, 34.
incident of, 34.
copyhold, 33, 35.
defined, 35.
system of, never had a place in United States, 35.
feudal,
abolished by Statute of 12 Charles II, 17, 34.
Domesday Book was the basis for, 32, 33.
frankalmoign, 35, 36. See also Frankalmoign.
gavelkind, 33, 34. See also Gavelkind.
defined, 34.
grand sergeanty, 34.
in chivalry, 34.
in England, 32, 33, 36.
kinds of, 33, 34.
military, 20.
manorial lords held by, 20.
system of uses defrauded lords of, 130.
principal, 33, 34.
system of,
applied only to immovables, 2.
of the Saxons, 32.
villeinage, 16, 19, 35.
defined, 19, 35.
service required under, 16, 35.
Texas, Republic of, annexation of, 25.
Thellusson Acts, 199. See also Accumulation.
Timber,
as personal property, 11, 321.
as real property, 11.
cutting of, when waste, 325, 326.
Title. See also Abstracts of Title; Covenants, of title; Records; Torrens System, of land registration.

Title—*Continued*
property distinguished from, 6.
to real property,
defined, 438.
acquisition and transfer of, 403, 541.
during life
with consent of owner, 403-501.
without consent of owner, 502-541.
and possession regarded as inseparable, 147, 438.
covenants of title, 437-463. See also Covenants, of title.
depends upon laws of country in which land is situated, 27.
never passes until possession is given, 147, 438.
of one in possession of land under claim of ownership, 41.
proof of, from records, 467.
rests in the last analysis on occupation, 502.
since 1085 in England derived from the Crown, 33.
sources of, in America, 21-31.
acquisition by the United States of English titles, 23.
by right of discovery and possession, 21, 22, 28.
cession of lands by the colonies to the general government, 24.
Indians, rights of, to the land, 25-27.
Indian titles, 25-31.
ceded by treaty, 29, 30.
Chief Justice Marshall's decision on, 27.
sustained if based on occupation and possession, 30.
United States has exclusive right to acquire title from Indians, 27.
law evolved from English law, 23.
pre-emption under federal statutes, 31.
purchases and acquisitions by United States, 25.
under colonial charters, 22, 23.
Titles of Honor, as real property, 7.
Torrens System,
of land registration, 470-474.
constitutionality of, 470, 471.
history of, 470.
in Australia and Illinois, 470.
operation of, 472.
power of court over defective titles, 473.
Massachusetts rule, 473.
procedure under, 472.
purpose and effect of, 471, 472.
to prevent stale claims, 471.
to provide for marketable title, 471.
to stop claims based upon uncertainty, 471.
Torrens Acts, history of, 470.
typical case for registration, 474.
when useful, 472, 473.

Torrens System, of land registration, when useful—*Continued*
where title depends on prescription, 473.
where title is complicated, or involved, 473.
Torts, claims arising from, subject to homestead exemption, 303, 304.
Trees,
personal property, when, 11, 321.
planted by tenant, when personal property, 8.
planted with the intention of removal,
covered by a mortgage on realty, 321.
whether real property, 321.
rights of parties,
when tree extends over boundary line, 312-314.
adjoining landowner may cut off the branches extending over, 313.
fruit on branches which extend over belongs to owner of property on which tree stands, 312-314.
owner not liable for trespass for going on another's land to collect the fruit, 313.
when tree is on boundary line, 314.
belongs to owners of adjoining property in common, 314.
standing forest, as realty, 322.
contract for sale of, within Statute of Frauds, 332.
parol sale as a license to cut and remove, when, 322.
Trespassers, crops sown by, 319.
Trusts,
estate upon condition distinguished from, 175.
executory, rule of Shelley's Case does not apply to, 94.
for an indefinite period void as opposed to rule against perpetuities, 211, 212.
for sale of property may be assailable as a perpetuity, 230.
for the accumulation of rents during the minority of tenants, void for remoteness, 202.
survive the Statute of Uses, when, 134, 135.
to preserve contingent remainders, 163.

Uses, 126-135.
as an attack on the feudal system, 130.
cestui que use, 126, 127, 130.
consideration for the grant, 127-130.
in equity, 128.
in law, 127, 128.
example of a use, 126.
feoffee to, the legal owner, 126.
introduction of, into the feudal system, 130.
origin of, 126-130.
to evade the Statutes of Mortmain, 126, 128.
shifting or springing use, 182.
defined, 182.
created by deed, 182.

Uses—*Continued*
Statute of Uses, operation and effect of, on, 130-134. See also Statute of Uses.
system of,
inconveniences and fraud arose from, 127.
resorted to during civil wars of York and Lancaster, 126.
trusts survive the Statute of Uses, when, 134, 135.
use on a use, Statute of Uses does not apply to, 134.

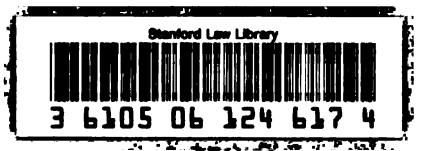
Vendor and Purchaser,
subsequent purchaser,
must be a bona fide purchaser for value to be protected under the recording laws, 468.
rights of, 467, 468.
unrecorded deed is defeated by recording deed of, 468.
Vested Interests, rule of perpetuities does not apply to, 201.
Vested Remainders, 39, 40, 149-153.
defined, 150.
contingent remainders become, when, 152, 153.
depend on language creating the remainder, 151, 152.
example of, 150, 151.
livery of seisin of, 39, 40.
remainder said to be vested, when, 150.
vesting of remainder,
Archer's Case, 155, 156.
on determination of particular estate, 155, 156.
rule of, 157.
when it is determined who will take it, 157.
Vested Rights, statutes abolishing estates tail, whether impairing, 81, 82.
Villeins,
defined, 19, 35.
land held by, under feudal system, 19, 35.
service required of, under feudal system, 16, 35.

Wardship,
defined, 15.
an incident of tenure by knight service, 34.
system of uses defrauded the overlord of his, 127, 130.
under the feudal system, 15.
Waste, 323-331.
defined, 323.
actions for, 331.
active, 323.
alterations in premises whether, 326, 327.
a purely statutory offense, 331.
brewery on leased land as, 327.
changing nature of use as, 327, 328.
cutting of timber, when, 325, 326.

Waste—*Continued*
equitable, 323, 324.
defined, 323.
commonly used in leases, 323.
lies where there is no remedy except in equity, 323.
legal, defined, 323.
liberal construction of, in America, 324.
malicious, 324.
manure, removal of, when, 328.
mines, working of, when, 329-331. See also Mines.
permissive, 325, 331.
bill in equity against tenant at will for, 331.
raising of land is not, 325, 326.
removal of structures erected by tenants, when, 328.
test, 328.
rule of law respecting, 327.
tenants,
at will,
action against, for permissive waste, 331.
are bound to make fair and reasonable repairs, 325.
implied duty of, to repair, 324, 325.
life, liability of, for allowing houses and fences to fall into decay, 325.
voluntary, 323, 331.
defined, 323.
action for, 331.
will not lie in cases where there has been no real damage done to property, 327.
"without impeachment of waste," defined, 323.
Waters,
division of land under, among riparian owners, 342.
natural right to, 347, 352-360.
percolating, 352-354.
malice in diverting, effect of, 354.
no right to, as against neighbor, 353.
pollution of, actionable, 353.
right of support of land subordinate to rights in, 366.
surface water distinguished from, 353.
riparian owners, rights of, in public lands, 484.
surface, 354-360.
arrest of, right to, 355.
in general no rights in, 354.
owner has right to prevent, from flowing on his land, 355.
artificial structure, effect of, 356.
from reaching natural water course, 355.
underground streams, 354.
use of stream, 356-360.
doctrine of prior appropriation, 359, 360.

Waters, use of stream, prior appropriation—*Continued*
beneficial use, what amounts to, 359.
for irrigation and milling purposes, 359.
grown up in western states, 359.
not known at common law, 359.
right to,
by prescription, 347, 359.
for business purposes, 358.
fair share allowed in America, 358.
for domestic purposes, 358.
reasonable and economical use, 358.
ice, 360.
pollute or make deposit in stream, 360.
reasonable use, 356-358.
test of, 357, 358.
wells, presumption that water of, is percolating water, 354.
Way, easement of, 347, 373-377, 380, 381. See also Easement, of right of way.
Wild's Case, Rule of, 71, 72.
Wills. See also Estates; Future Estates; Gift.
alteration of interests,
after testator's death, 153, 154.
before testator's death, 153.
examples of, 153, 154.
at common law construed according to intention of testator, 68.
conditional limitations in, 169, 170.
definite failure of issue, 69.
devise to a class, 154, 155.
"dying without issue,"
American view, 205, 206.
construed by Connecticut court, 71.
English view, 205.
effect of Statute of Uses on, 135.
gift over on failure of issue creates an estate tail, when, 69-71.
examples of, 70, 71.
void for remoteness, creates a fee tail estate, 70.
how to draw, so as to give the devisee the right to sell and yet have the remainder go to a third person, 167, 168.
indefinite failure of issue, 69.
land devised,
upon condition that the devisee does not marry, void, 170.
while devisee remains single, valid, 170.
modifying clauses, rule against perpetuities applied to, 229, 230.
proposing to give a devisee the income of real property free from liability for his debts, void, 109.
right to devise land by will, 48.
by special custom under early law, 48.
by Statute of Wills, 48.

Wills—*Continued*
rules relating to, are rules of construction, 196.
construing the intention of testator, 196.
separable limitations, rule against perpetuities applied to, 230, 231.
words "heirs" or "male heirs" necessary in, to create an estate tail, 68, 69.
Writ,
of formedon, 76, 164.
defined, 164.
not applicable to one who has a right of entry, 164.



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